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CIVIL AND SPIRITUAL JURISDICTIONS:

THEIR UNION AND DIFFERENCE.

A TREATISE

GIVING SOME ACCOUNT OF ECCLESIASTICAL APPEALS IN FOREIGN COUNTRIES,
WITH A HISTORY OF THE ORIGIN AND CONSTITUTION
OF THE JUDICIAL COMMITTEE OF PRIVY COUNCIL IN ENGLAND.

With an Appendix containing the Judgments of the Lords Justices of Appeal and the Court of Queen's Bench, touching the Public Worship Regulation Act.
The Judgments in Ecclesiastical Cases delivered by the Judicial Committee of Privy Council since those published under the sanction of Archbishop Tait of Canterbury, when Bishop of London, in 1865.
The Judgment of the Rolls Court in the Colenso Case; and all the Statutes on which is founded the Jurisdiction of the Judicial Committee in Spiritual Causes.

BY

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SECOND EDITION,

REVISED, RE-ARRANGED, AND ADAPTED TO THE CIRCUMSTANCES OF THE PRESENT TIME.

EDITED BY HIS SON

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NOTICE TO THE READER.

The materials of the former Edition (1869) of this Work are revised, re-arranged, and adapted to the circumstances of the present time. The Appendix is enlarged by the addition of the Judgments of the Justices of the Queen's Bench, and the Lords Justices of Appeal, on the constitution and appointment of a Spiritual Judge; and also of some recent Judgments of the Judicial Committee of Privy Council. The best thanks of the Editor are due to the Rev. T. W. Perry, for arranging the Appendix and correcting the proofs of it.

EDITOR.

September, 1881.

Ἔχουσι μὲν γὰρ καὶ οἱ κρατοῦντες ἐπὶ τῆς γῆς τὴν τοῦ δεσμεῖν ἐξουσίαν, ἀλλὰ σωμάτων μόνον· οὗτος δὲ ὁ δεσμὸς αὐτῆς ἅπτεται τῆς ψυχῆς, καὶ διαβαίνει τοὺς οὐρανούς, κ.τ.λ.

S. Jo. Chrysost., Lib. iii. §. 5.

Dedication to the First Edition.

TO THE

PROVINCIAL SYNODS OF CANTERBURY AND YORK,

This Treatise,

ON SUBJECTS AFFECTING THEIR SACRED DUTIES

AND CONSTITUTIONAL RIGHTS,

IS,

WITH FILIAL REVERENCE FOR

"THE TRUE CHURCH OF ENGLAND BY REPRESENTATION,"

MOST HUMBLY DEDICATED BY

THE AUTHOR.

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INTRODUCTION.

Chief functions of Ecclesiastical Courts.

Of all the functions which the executive authority of the Church of England has to discharge, those relating to doctrine are unquestionably of the highest and most lasting importance. For decisions in this respect settle what may and what may not be taught as Divine truth by clergymen to the people committed to their spiritual charge. This subject is necessarily one of vital importance to all faithful laymen, as they ought to be enabled to rest in firm assurance, when they resort with their wives, children, and servants to their parish churches, that no doctrine will, with such authority as a clergyman's character and position impart, there be taught which is not in accordance with the faith of the Church. And it is beyond all controversy one of the primary objects and duties of Ecclesiastical Courts, as well as of Archbishops and Bishops exercising their authority in such Courts, when milder measures fail, to confirm this assurance by providing that the teaching of the national Clergy shall be conformable to the national standards of faith. Of course, under such circumstances, questions connected with a Court of last resort, which affects to control all ecclesiastical jurisdictions, are of paramount importance.

Its history, its constitution, its powers, its agreement or disagreement with the inherent principles of Church authority established by our Lord Himself and ratified by venerable antiquity, its fitness or unfitness for the functions it undertakes—all these can hardly fail of being subjects of deep interest. They are therefore worthy of careful and calm consideration. To such and cognate matters the reader's attention is now asked.

CHAPTER I.

THE UNION OF CIVIL AND SPIRITUAL JURISDICTIONS, AND THE DISTINCTIONS BETWEEN THEM.

1. The Union and Distinctions between Civil and Spiritual Jurisdictions.—2. Recognized in England formerly.—3. Now overlooked.

"Render therefore unto Cæsar the things that are Cæsar's, and unto God the things that are God's." S. Matt. xxii. 21.

1. The Union and Distinctions between Civil and Spiritual Jurisdictions.

This divine command was not overlooked by Edgar when he thus addressed Dunstan. "I," said that king to the Archbishop, "bear the sword of Constantine, you the sword of Peter; let us then join our right hands, ally sword to sword that the lepers may be cast out of the camp, the sanctuary of the Lord cleansed, and that the sons of Levi may minister in the Temple." Conc. Mag. B. 1. 246. This was a moving appeal invoking the union of civil and spiritual jurisdictions, and meanwhile marking clearly the distinctions between them. Such a union is fraught with blessings to any church and nation if rightly cemented; but if the distinction is overlooked the most calamitous evils will be the inevitable result.

The distinction between spiritual and civil jurisdiction is as wide as the difference between the kingdoms of this world and that of the next. Spiritual jurisdiction is derived through the Church from the commissions given on the evening after the resurrection, and on the Galilean mount; civil jurisdiction is derived from the temporal power existing in the locality where such jurisdiction is exercised. Not only is the *fons jurisdictionis* in the two cases different, but the two jurisdictions have for their object different ends.

Spiritual jurisdiction is exercised in pronouncing sentences of admonition, censure, excommunication, and such like. Civil jurisdiction is exercised in respect of rights of property and liberty of person.

2. Recognized in England formerly.

Before the Norman conquest the union between civil and spiritual jurisdictions, and the distinction between them were attested by the fact of the bishop and a civil judge sitting together in the same court. But King William I. separated the jurisdictions, and by Charta made this alteration in the system of judicature, that for the future the hundreda and the bishop should sit in separate courts. From that time downwards the bishop has exercised two jurisdictions in his court, which, though united in one person, are as diverse as was above shown. The civil or external coactive jurisdiction being conceded to him by the Crown, the spiritual jurisdiction being inherent in himself.

3. Now overlooked.

However this broad distinction between civil and spiritual jurisdictions in their origin and in the exercise of their functions appears to be entirely overlooked by the British Parliament, which has lately enacted a statute affecting to constitute a spiritual judge, and which moreover has provided that under certain circumstances a judge of both the Metropolitan Courts of Canterbury and York should be appointed by the Crown. But if neither the Parliament nor the Crown possess themselves the powers of spiritual admonition, censure, excommunication, and such like spiritual judgments it is clear that they cannot confer them upon another.

P.W.R. Act.

Judges so appointed, whatever civil authority they would possess, must entirely lack all spiritual jurisdiction whatever, as such jurisdiction can only be derived by delegation from the Metropolitan over whose Court they would preside.

That Parliament missed its way in this matter is perhaps not altogether surprising as our Legislature is not renowned for its adherence to the approved principles of jurisprudence.

If any one should be inclined to doubt this he may be recommended to peruse the Church Building, Draining, Bankruptcy, and Conveyancing Acts passed in this generation, which are a Babel of confusion and a disgrace to the English statute book. After such perusal any doubts on the subject will surely be dispelled, and if Parliament misses its way so seriously in these well trodden paths it is no wonder that it should hopelessly lose it in the less familiar region of original jurisdictions.

But if one is not much surprised at the performance of Parliament in this matter considerable astonishment arises from the fact that some of the most prominent of our judges have fallen into a like error. That those whose profession calls upon them to recognise the origin of jurisdictions, and study the principles of jurisprudence, should confuse civil and spiritual jurisdic-

tions, is little short of amazing. Nevertheless, the Justices of the Queen's Bench and the Lord Justices of Appeal have with unanimous consent and, as may be said, with one voice, solemnly announced to the world that Parliament has power to create a Dean of the Arches, that is to say a spiritual judge, and that in the exercise of its powers it has created such an officer. One stands fairly aghast at such an announcement from such a quarter. Such a portent, to borrow an image from Rome's imperial poet, surely the wild woods of Daunias or the arid land of Juba never generated. What Pegasus can ever extricate minds subject to such hallucination from the chimera which fascinates them? vid. App. A.

However, whatever the British Parliament may enact or English judges say the distinction between civil and spiritual jurisdictions is (i) attested by historical precedents; (ii) affirmed by competent authority in all ages of the Church; and (iii) maintained by the constitutional compact between Church and State, as shall be shown in the chapters next following.

CHAPTER II.

THE DIFFERENCE BETWEEN CIVIL AND SPIRITUAL JURISDICTIONS ATTESTED BY HISTORICAL PRECEDENTS.

Imperial authority only quoted—Constantine, Valentinian, Gratian, Theodosius I., Honorius, Theodosius II., Pulcheria, Marcian, Theodoric, Justinian, Constantine IV.

History affords ample evidence that the difference between civil and spiritual jurisdictions has ever been acknowledged.

To quote the decrees of Patriarchs, Metropolitans, and Bishops, the acts and proceedings, the canons and constitutions of synods and councils, in confirmation of this point, would be to transcribe folios. But though this means of proving the point before us shall be entirely eschewed, yet some evidence of another kind shall be produced which cannot be charged with ecclesiastical bias or priestly proclivities, and which from its courtly origin may perchance have greater weight with some minds than any ecclesiastical testimony whatever. No canon, no constitution of any synod or council whatever shall be invoked. Reliance will be placed on Royal and lay testimony only, and it may be hoped that such evidence, if ever they should happen to peruse it, may shake even the convictions of the most incredulous.

Imperial authority only quoted.

Now for evidence of this character on this point, we need not of course go farther back than to the time when the civil power first acknowledged the truth of Christianity, and adopted it as the State religion—that is, to the age of Constantine the Great. Yet immediately after that event we find at once an abundant supply of the Royal testimony now desired. It is continued throughout the whole stream of subsequent history, and some shall be produced in chronological order.

Eus. Vit. Const. l. 3. c. x. ad-fin.

Theodoret H.E. Lib. 1. c. 7.

Ibid. Ibid. c. xvii. Ibid. c. xx.

Ibid. l. 4, c. xxiv.

The Emperor Constantine, when attending at the Council of Nice, though dazzling the eyes of all beholders with the splendour of his apparel and the radiance of the gold and precious stones which adorned his garments, yet indicated his humility by his downcast eyes, a blush on his countenance, and the tenour of his whole demeanour. He professed himself the fellow-servant of those rulers of the Church there collected, and confessed that what was transacted in the sacred councils of the bishops was to be set to the account of the Divine will. And using the word "Episcopos" in its true meaning of overseer, he said, in no offensive sense to the Bishops, "Ye indeed are overseers of those

things which are within the Church, I of those things which are without it." Indeed, in such sort did he regard the decrees of bishops promulged in councils, that he forbad any secular magistrate to rescind them. And moreover, on the occasion of this great Council of Nice, testifying his joy at finding himself surrounded by so august an assembly, he declared that— Ibid. c. xxvii.

"He himself desired to appear in the council simply as one of the faithful, and that he freely left to the bishops the sole authority to settle the question of faith." Man. Counc. p. 432.

Moreover, the public management of this Emperor was quite consistent with this reasonable declaration, for "he separated ecclesiastical jurisdiction into two parts, external and internal; the latter he left to bishops and councils, the external he assumed to himself." Mosh. Eccl. H. p. 141, Helms.

The Emperor Valentinian the elder, who died just fifty years after the Council of Nice, on a condemnation of Arianism being proposed, thus writes—

"It is unlawful for me, who am placed among the laity, to meddle with matters of faith. Let then the priests and bishops, to whom this case belongs, meet apart by themselves wherever they will." Soz. vi. 7. Eccl. Pol. B. viii. Ch. v. 2. Col. Eccl. Hist. vi. 247.

Valentinian's rescript adds its testimony—

"Thy father enacted that in matter of faith or ecclesiastical order that person who is neither in office unequal nor in law unlike should be judge. These are the words of the rescript . . . . he willed that priests should judge of priests. . . . . When did you hear that laymen ever judged bishop or priest in matters of faith? Considering Holy Scripture or ancient times, who will deny that bishops are wont to judge Christian emperors, not emperors bishops. If I am to confer on the faith, the conference must be before priests, as was the case under Constantine of august memory, who did not initiate any laws, but left the judgment free to priests." Ep. xxi. Imp. Val.

The Emperor Gratian, the eldest son of Valentinian the elder, succeeding his father in the purple A.D. 375, convened the Council of Aquileia on the explicit ground that matters of faith should be settled by the spiritualty. And the testimony to this fact we learn from words addressed to that assembly as follows:—

"Lo, what a Christian emperor hath ordained. He would not wrong priests, he made bishops interpreters of the faith." Gest. Conc. quil. s. 5.

The Emperor Theodosius the Great, who swayed the Imperial sceptre when the first Council of Constantinople against the Macedonians was held A.D. 381, made no scruple to confess that—

"It is not lawful for a man who has not the episcopal character to interpose in religious affairs." Coll. Eccl. Hist. vi. 247.

The Emperor Honorius, born 384, who wore the purple between the dates of the Councils of Constantinople and Ephesus, and

who took no part in any Œcumenical Synod, yet delivered himself as follows :—

Epist. Honor. ad Arcad.

"If any thing is to be settled in matters of religion, the judgment ought to be episcopal, for the interpretation of Divine things belongs to them ; to us the obedience of religion."

The Emperor Theodosius II. appears as a most serviceable witness to our cause, coupled with his brother Emperor Valentinian III., though on the testimony of the latter one would not lay much stress in consideration of his youth at the period when his evidence was contributed. These emperors wielded the sceptre of the civilized world at the time of the Council of Ephesus, 431, and considerable patience must be exacted from the reader while pressing their somewhat lengthened testimony on his attention. Thus writes Theodosius II. to Cyril of Alexandria :—

Ep. Theod. ad Cyril. Labb. et Coss. t. 3, p. 436.

"We will not permit this doctrine to remain unexamined, of which those must be the judges who bear authority in the priesthood, and by whose means we ourselves both are and will be maintained stedfast in the truth."

The following is again the testimony of the brother Emperors to their conviction that laymen should not be allowed to interfere in authoritative decisions of faith. When they sent Candidian, a layman, to represent the Imperial authority at Ephesus during the sessions of the third Œcumenical Council, they signified by a letter under the inscription of their hands that he was despatched—

Ep. Theod. et Valent. ad Syn. Eph. Labb. et Coss. t. 3, pp. 443, 444.

"Under this restriction and condition, that he should in no way whatsoever interfere with questions and controversies concerning dogmas of faith. For it is impious in any man whose name is not enrolled in the most holy bishops' list to mix himself up in ecclesiastical business and discussion."

Count Candidian also himself declared that he had no voice in the discussion of the Council ; his words were :—"If by chance any matters should come into discussion, to which we are strange, they must be submitted to the judgment of all you who are present."

Hard. T 1. col. 1352.

And here it may just be remarked, as it were in a parenthesis, and by the way, that these Emperors thus gave no countenance whatever by this example to that odd figure which Thomas Cromwell assumed when sent by King Henry VIII. to a Canterbury Synod in later times.

In the same sense as the passage last quoted are the words of the prefectorial edict published with that same imperatorial sanction.

Edict. propos. a Præfectis apud Conc. Eph. Labb. et Coss. t. 3, p. 1216.

"No dogma on a matter of religion ought to have any weight except that which has been approved of by the most reverend and most holy bishops, &c."

And the testimony to our argument supplied by these two Emperors shall be now summed up in their own words, when they proclaimed in a solemn edict that—

"No interference with matters which were consecrated to the honour of religion ought to result from the rashness of any man," and that, "in proportion as they themselves afford a spectacle of more retiring authority, so is there promised to them a higher measure of the majesty of empire." Edict. Theod. et Val. ap. Conc. Eph. Labb. et Coss t. 3, p. 1241.

The same principle was recognized by Florentius, the Imperial commissioner sent by Theodosius II. to the Council of Constantinople, A.D. 448. When the acts of the Council were in course of verification Florentius discovered that he had been falsely represented as having spoken dogmatically on doctrine. But he interposed and denied it, saying, "This speech I never made nor am I capable of pronouncing on dogma."

We must not, however, finally take leave of Theodosius II. without reference to the Theodosian code in which the principle was formally laid down in more places than one—that causes ecclesiastical should be confined to ecclesiastical Courts. The following is one instance— Cod. Theod. l. xvi. t. xii. de Ep. Jud. l. 3.

"We sanction by a perpetual law, that no bishop, nor any one in the service of the Church, be drawn into the Courts of any judges ordinary or extraordinary, so far as relates to ecclesiastical causes, which ought to be decided by episcopal authority." Cod. Theod. l. xvi. t. ii. de Episc. Leg. xxiii. et t. xi. de Rel. Leg. l.

Further evidence on this point is afforded by the proceedings at the Council of Chalcedon A.D. 451. The Emperor Marcian or his representatives were present, but "They never subscribe and they acquiesce in all sentences of the Bishops." Bell. de Conc. l. 19, p. 89.

This conduct was agreeable to the principle recognised on all hands in those days that there is a difference between civil and spiritual jurisdictions. The Empress Pulcheria in the letter she addressed to the Council at Chalcedon writes:—"You will dismiss from the city and neighbourhood any clergy who without summons from us or permission of their bishops are lingering there . . . . or monks or *laymen* whom there is no reason to summon to a synod, so that the holy synod having held its sittings in perfect good order, the things enjoined by our Master Christ may be ratified in common by all without any tumult." Hard. Conc. II. 47, 48.

And the Emperor Marcian addressed the Council in these words:—"Let the truth be set forth by your expositions, for I having taken Constantine as my example have thought fit to be present at the Synod in order to append confirmation to its acts, not to make a display of power." Hard. Conc. II. 465 A.

Again, Theodoric, King of Italy, thus writes to Justin, predecessor of Justinian in the Eastern Empire:—"To pretend to a dominion over conscience is to usurp the prerogative of God. By

Milman's Latin Christianity, vol. 1, p. 299, quoting Cassiodorus II. 6, III. 28.

the nature of things the power of sovereigns is confined to political government. They have no right of punishment but over those who disturb the public peace."

Rose, Biograph. Dict. in loco.

And the Emperor Justinian, that acknowledged Nestor of jurisprudence, ecclesiastical and civil, who succeeded to the Imperial throne in 527, and swayed the sceptre at the second Council of Constantinople in 553, has left in his Novels most irrefragable testimony to our purpose—

Imp. Just. Novel. Const. No. 83, Ed. H. Steph. 1558.

"If the offence be ecclesiastical, requiring ecclesiastical judgment and correction, let the most holy bishop give judgment—the most illustrious civil judges in no way interposing. For we will that such causes should be by no means entertained by secular authorities, according to the sacred and divine rules which our laws do not disdain to follow."

And again—

Imp. Just. Novel. Const. No. 77, Lugd. 1561.

"But if the offence is ecclesiastical, then the trial and penalty proceed under the bishop alone, according to the canons, other judges having no connexion with causes of this character."

Bellam. de Conc. L 1, xix. p. 91.

In the VI Œcumenical Council, Constantine IV. Pogonatus "sat in the first place, but he was in no sense a judge . . . . for he gave no sentence, he subscribed last of all, and then not as 'defining' but as 'consenting.'"

Rose, Biograph. Dict. in loco.

The Emperor Basilius, who established his sole Imperial sway in 867, and illustrated his reign by a new digest of the Code of Jurisprudence, which had not been revised since the time of Justinian, in no way receded from the principles of his predecessor before recounted. In the second year of Basilius' reign the Council of Constantinople was convened (falsely called the eighth Œcumenical Council) against the heresy of the Monothelites, and to that assembly he addressed the following words, plainly indicating that ecclesiastical judgments were still confined to ecclesiastical persons :—

Alloc. Basil. ad viii. Syn. ac. x. A.D. 869.

"I say it is not permitted to any layman whatsoever to move questions on ecclesiastical subjects, or to stand against the whole Church or an Œcumenical Synod. For to search out these things belongs to patriarchs, and priests, and teachers, to whom the office of ruling is assigned, to whom the power to consecrate, to loose and to bind, is given, who have the keys of the Church and of heaven; for the layman, although he is full of all reverence and wisdom, is yet a layman and a sheep, and not a shepherd."

Landon Manual 190.

This was the language of an Emperor who yet occupied the chief seat in Council. It shows that sitting to maintain order is quite compatible with having no "voice decisive."

Bellarm. de Conc. L 1, cxix. p. 92.

"At last he subscribed the Acts after all the Patriarchs, not as 'defining' but as 'undertaking' and 'consenting,' having, however, first declared that he ought to subscribe after all the Bishops, as formerly Constantine, Theodosius, and Marcian had done; yet that he had subscribed immediately after the Patriarchs, because the Bishops desired to confer such honour on him."

The foregoing contains considerable evidence, though it is by no means an exhaustive list of the testimonies, from the mouths and acts of Emperors, which might be produced to prove the point before us. As before said, no account whatever has been taken of Synods, Canons, Patriarchs, Metropolitans, Bishops, lesser Clergy, or, indeed, of any ecclesiastical testimony whatsoever. Had this course been pursued, example and authority might have been multiplied to a vast extent. But I have consistently restrained all the evidence produced within the region of the Imperial purple in the faint hope that such testimony may have some weight, as it ought to have, with those who cherish over expansive notions of the extent of civil authority, and at least, as it appears to me, sometimes invoke a blow of the sceptre to demolish the fairest argument and to disable even the most sacred rights; at any rate, the evidence above produced may convince any one who has had the patience to peruse it that the announcements of the Justices of the Queen's Bench and the Lord Justices of Appeal on the constitution and appointment of a spiritual judge by Act of Parliament, as well as the constitution of our present Court of Final Appeal in ecclesiastical cases, do ignore as directly as can be conceived the distinction between civil and spiritual jurisdictions as attested by historical precedents.

CHAPTER III.

THE DIFFERENCE BETWEEN CIVIL AND SPIRITUAL JURISDICTIONS AFFIRMED BY COMPETENT AUTHORITY IN ALL AGES OF THE CHURCH.

1. A principle affirmed by the Council of Jerusalem.—2. The Early Fathers—Hosius, Ambrose, Chrysostom, Jerome.—3. Quinisext Council.—4. Writers of more modern Times—Andrews, Bilson, Casaubon, Hooker, Field, Jeremy Taylor, Mason.—5. Canonists—Van Espen, De Marca.—6. Bishop Scott's Speech in the House of Lords.

1. A principle affirmed by the Council of Jerusalem.

THE difference between Civil and Spiritual jurisdictions, that is to say, between Lay and Spiritual authority in the determination of doctrine and discipline is affirmed by the history of the Council of Jerusalem.

That first primitive Christian Council (providing a pattern for subsequent synods, as it does for the English Convocations,—bishops and presbyters there uniting in council) was summoned about seventeen years after our Saviour's Crucifixion, to determine, among other matters, a question which had arisen at Antioch as to the necessity of circumcision among the Gentile converts to Christianity. For the settlement of this question it was agreed that SS. Paul and Barnabas should go up to Jerusalem. And on due consideration of the sacred narrative it is clear that in the early model Christian council then held in that city, this principle was closely adhered to, that questions of doctrine and spiritual discipline should be decided by the ordained teachers of the Word, the "Apostles and Elders," and by them only. For when SS. Paul and Barnabas went up to Jerusalem we are
Acts xv. 2. distinctly informed (1) that it was "unto the Apostles and Elders about this question" that they were sent, and to them only.
Ibid. 6. (2) We are told with equal distinctness that "the Apostles and Elders came together for to consider of this matter," and they only. (3) And further, the judgment given at this council is afterwards mentioned in Holy Writ as having been determined by the "Apostles and Elders," and by them only. For when S. Paul proceeded on his second journey, in company with Silas,
Ibid. xvi. 4. as they passed through the cities, "They delivered them the decrees for to keep that were ordained of the Apostles and Elders which were at Jerusalem."
Ibid. xv. 22. It is fully admitted that "the whole Church" at Jerusalem

joined with the Apostles and Elders in sending messengers to Antioch. But that is an act which might well become the lay brethren in every age. According also to our authorised translation the "brethren" joined with the Apostles in the superscription to the encyclical letter thither despatched, but the most approved manuscripts confine such superscription to the Apostles and Elders, and to them only. Ibid. 23. Text uncertain.

The principle on which the laity were invited sometimes of old to be present at synods is explained by Viventiolus, Bishop of Lyons, at a synod held at Epaone, A.D. 517. He says: "The laity are present in order that they may recognise what is determined by the clergy alone." Hard. II., p. 1046.

But what has been maintained above is that SS. Paul and Barnabas were sent to the "Apostles and Elders," and to them only—that the "Apostles and Elders" and they only, came together for deciding the question, and further, that the judgment is mentioned in the sacred narrative as that of the "Apostles and Elders," and of them only. Vide also Acts xxi. 18.

2. The Early Fathers—Hosius, Ambrose, Chrysostom, Jerome.

The principle under discussion has been affirmed in the most eloquent language, in successive ages of the Church. Hosius, writing to Constantine, says:—"Under this head do not teach us, but rather learn these things from us. To you God has granted empire, to us the things which He has committed to the Church." And then he adds "For who, if he saw a prince constituting himself a judge of bishops and presiding in ecclesiastical judgments, would not rightly say that he was the very abomination of desolation spoken of by Daniel the prophet." Bellarm. De Conc. L. i. cxix.

S. Ambrose:—

"When, most gracious Emperor, have you heard that laymen judged of bishops in questions of faith? So therefore we laying aside all flattery, are careful to be mindful of our spiritual rights. And what God has committed to me I think should be believed by others. If a bishop is to be taught by a layman, what will be the consequence? In that case the layman would argue, the bishop listen: the bishop would learn from the layman. . . . . who would deny in a question of faith—I say in a question of faith—that bishops were wont to judge of Christian Emperors, not Christian Emperors of bishops? Ambrose, L. v. Ep. 35.

S. Chrysostom writes thus:—

"Distinct are the limits of the temporal kingdom from those of the priesthood, nobler is the power of the latter. . . . . The King must not be judged of by the gems which stud his apparel, nor by the gold with which he is adorned. His province is to rule earthly things, but the authority of the priesthood reaches to heavenly things—whatsoever ye shall bind on earth shall be bound in heaven. To the King are entrusted earthly things, to me heavenly things." Hom. in Verb. Is. Vidi. Dom. p. 757, Paris, 1636.

And the same revered authority in another place enforces the like thoughts in the following golden words:—

"To the King's authority are entrusted men's bodies, to the priests', their souls. The King remits their debts, the priest their sins. The one compels, Ibid. p. 758.

the other exhorts. The one acts by force, the other by persuasion. One wields sensible weapons, the other spiritual. He wars against barbarians, I against the evil angels, and the latter is the nobler exercise of power."

And again—

De Sac. iii. 5. "Civil rulers have power to bind on earth, yet so far only as men's bodies are concerned; but this (the spiritual) bond applies to the soul, and reaches to heaven."

Of this distinction between civil and spiritual jurisdictions, S. Jerome speaks in the words following:—

Epitaph. Nepotiani, c. 7. "The King governs the subjects whether they will or not, the bishop governs none but the willing. One keeps them in subjection by law, while the other is in some sort their servant. The one holds men's bodies in custody for death, the other preserves their souls for life."

3. Quinisext Council. The 64th Canon of the Quinisext or Trullan Council is as follows:—"It does not behove a layman to dispute in public or to teach, but to yield to the order handed down from the Lord, and to open his ear to those who have received the gift of teaching the Word, and to learn from them divine truth." For a breach of this Canon a penalty of forty days' excommunication was assigned.

4. Writers of more modern times—Andrews, Bilson, Casaubon, Hooker, Field, Jeremy Taylor, Mason. To come down to later times, and recalling the thoughts of some of the devoutest minds, we find the same sentiments to have prevailed. Thus writes Bishop Andrewes, of revered memory:—

Tortura Tort. p. 380. "The King in no way allows authority to be assigned to him of burning incense with Uzziah or of touching the Ark with Uzzah . . . He does not assume the office of teaching or of explaining the doubtful matters of the law [divine], or of preaching or of ministering sacred rites, or of celebrating Sacraments, or of consecrating persons or things. He does not assume the power of the keys or of censure. To be brief, neither does he, nor do we, believe any authority to belong to him which respects the priestly office or depends upon the power of ordination. The King discards all this, and banishes it utterly."

To the same purpose writes Bishop Bilson in several places:—

Christian Subjection, p. 297 Ibid. p. 327. Ibid. p. 352. "That princes may prescribe what faith they list, what service of God they please, what form of administering Sacraments they think best, is no part of our doctrine. . . . . We give princes no power to devise [or invent new religions, to alter or change Sacraments, to decide or debate doubts of faith, to disturb or infringe the canons of the Church. . . . . We never said that princes had any spiritual power, and the sword which they beare we never called but externall and temporall, for the true spirituall and eternal sword is the Word of God."

The learned Isaac Casaubon expresses the same thoughts when he distinguishes between internal spiritual authority and external coactive jurisdiction, in the following words:—

Dedic. Exerc. Baron. "Princes should consider that it is one thing to act as a priest, to interpret the Scriptures from the pulpit, to administer Sacraments, to bind and loose in the Name of Christ: that it is another thing to provide by their authority that the priest should perform those functions which pertain to the priestly office."

The decision of spiritual questions has, if one may so speak, been always looked upon as a sacred inheritance, not to be abandoned at the challenge of any one; as a Divine trust, entailing holy possessions not to be disposed of to any who should be so over bold as to lay claim to them. "The Church," said Ambrose, when urged by the younger Valentinian to give up her material fabrics to the Arians, "is the house of God, and those things that are God's are not to be yielded up and disposed of at the Emperor's will and pleasure. His palaces he might grant to whomsoever he pleaseth, but God's own habitation not so." And as the edifice of Christian truth is more fair, so it is more tender and fragile, than her material buildings, and should be maintained inviolate even with greater determination and more careful circumspection.

Hook. Eccl. Pol. iii. 358.

A most judicious man has told us, that he accounted it "absurd" that Kings or Queens should hear and determine causes appertaining to the Church, or "decide the questions which do arise about matters of faith and Christian religion." He would not have the very highest lay authority, still less one thence delegated, invoked for such a purpose. For those consecrated even to the most august civil office do not partake of that peculiar character, nor do they inherit those peculiar powers and duties with which the Lord of the Church has invested His servants therein called to the ministry of His Word and Sacraments. The acknowledgment of this fact was universal in the earlier ages of the Church, and has been maintained throughout the whole stream of history, and very distinctly in our own land, down to comparatively recent times. Indeed, by no thoughtful and devout mind can a distinction fail to be drawn between the powers of this world and the exercise of His delegated authority who has said, "My kingdom is not of this world."

Hook. Eccl. Pol. iii. 348.

Our most venerated writers all bear testimony to this distinction. Hooker says—"Of this most certain we are, that our laws do neither suffer a spiritual Court to entertain those causes which by the law are civil, nor yet, if the matter be indeed spiritual, a mere civil Court to give judgment of it." The learned schoolman Field, speaking on the subject of spiritual judgments, says—"We all teach that laymen have no voice decisive, which may be confirmed by many reasons," some of which he proceeds with his usual eloquence to specify. Jeremy Taylor assures us that the intrusion of lay judges into spiritual arbitrations is "an old heretical trick," and he speaks of it as "a pretty pageant, only that it is against the Catholic practice of the Church, against the exigence of the Scripture, which bids us require the law at the mouth of our spiritual rulers." The learned Barrow contributes his testimony when he asserts that "the power of managing ecclesiastical matters did, according to primitive usage, wholly

Eccl. Pol. iii. 359, 360.

Of the Church B. v. p. 646.

Works, vii. 208.

Ibid. 209.

Serm. 57, vol. iii. p. 311.

reside in spiritual guides." And finally, the golden-penned Francis Mason repudiates any other view that that maintained by this stream of venerable authority when he asks—"Which of us did ever assert that princes are the supreme judges or determiners in controversies of faith and religion?" No indeed! such assertions were never made by the wise and learned and good men of former days, they are reserved for our times, and their authors would do well to ponder on the weighty words of S. Augustine, in his "City of God," when he thus writes—"Those Emperors we call happy who . . . . are not elated by tongues that extol highly, or obsequiousness that flatters humbly, but who remember that they are but men, and in promoting the worship of God subordinate their own authority to His Majesty."

Vind. Ch.Eng. p. 228.

De Civ. Dei, v. 24.

5. Canonists —Van Espen, De Marca.

The testimony already set forth shall now be fortified by the words of two of the most learned canonists which the world has produced. Van Espen thus writes:—

De promulg. Leg. Eccl. t. iv. fol. 164. Lovan, 1753.

"Without doubt the examination and decision of matters of faith was confided by God to the Church and her ministers, but not to lay authorities. . . . Nor did Christian princes ever assume this authority to themselves, but invariably acknowledged . . . . bishops and pastors of the Church as judges of doctrine."

Again, the learned Belgian Jurisconsult thus writes to the same effect:—

Ibid.

"It is one thing for a prince to exert his authority in the promulgation and execution of a new law throughout his provinces; it is a very different thing to undertake to judge of articles and dogmas of faith, or to define what is to be held or not to be held as 'de fide.'"

De Marca, speaking of Imperial proceedings with reference to ecclesiastical jurisdiction, thus confirms the testimony of his brother canonist:—

De Concord. Sac. et Imp. iii. cl. 200, Bamb. 1788.

"The Roman Emperors certainly exercised high authority in ecclesiastical affairs and judgments; but I do not believe that any example can be adduced of a canonical judgment pronounced by one bishop from whom an appeal was carried directly to the prince. They invoked ecclesiastical judges, yet never did they themselves take cognizance of subject-matter which was canonical, but only of the regularity of judgments."

To this evidence may be added that of Isaac Casaubon, whose name has almost passed into a proverb for learning, and who, though born at Geneva, may in some sort, at least from the place of his residence, death, and burial, be claimed as a countryman of our own. He thus writes:—

Rose, Biograph. Dict. in loc.

Is. Casaub. de Libert. Ecc.

"Appeals are made to them, i.e. the bishops, who assembled in a synod, and are the lawful judges of divine affairs, as to those to whom the cognizance of such controversies belongs. But the prince is appealed to, not that he should pronounce sentence concerning divine matters, but that he should command it to be duly and orderly pronounced."

6. Bishop Scott's Speech in the House of Lords.

This whole subject is so tersely summed up in a speech delivered by Scott, Bishop of Chester, before the House of Lords, in the reign of Queen Elizabeth, on the subject of the Uniformity Bill of that reign, that a part of his Lordship's address shall be here transcribed. And one is the more inclined to refer to that Prelate's words, as in some sense they pretty closely apply to the subject of our whole inquiry.

"Your Lordships," said that bishop, "may please to remember the great danger you draw upon yourselves by undertaking to judge in the cause, especially if you should happen to make a wrong decision; for then, besides the misfortune of your own persons, you will prove the unhappy occasion of misleading others. King Jeroboam has this mark set upon him as an aggravation of his misbehaviour, that, besides his personal miscarriage, he made Israel to sin. My Lords, I entreat you would be very careful to prevent the application of this text. . . . . Those who are well read in ecclesiastical history, and acquainted with the methods of the Church in debating religious controversy, can easily inform your Lordships that these matters have been all along decided by the clergy, and not by the laity. The Arian heresy, in the reign of Constantine the Great, was canvassed and condemned in the Council of Nice. The heresy of Macedonius in the first Council of Constantinople, in the time of Theodosius the Great. The heresy of Nestorius in that of Ephesus, in the reign of Theodosius the Younger. The heresy of Eutyches in the Council of Chalcedon, under Martin [Marcian is meant]. But here we are to observe that none of these religious Emperors ever convened their temporal nobility or commons to advise or determine in these causes." Cott. Lib. Vesp. D. 18, fol. 114. Coll. Eccl. H. vi. 246.

Now if any persistent reader should have been endued with sufficient patience to struggle through the foregoing dry details, he will see good reason for doubting the wisdom of Parliament in the enactment of the P. W. R. Act and the announcements of the Lords Justices of Appeal and the Justices of the Queen's Bench on the constitution and appointment of a Spiritual Judge by Act of Parliament, and will be further convinced that the constitution of the present Court of Final Appeal in ecclesiastical cases wholly ignores the distinction between Civil and Spiritual jurisdictions affirmed by competent authority in all ages of the Church. vid. App. pp. 1, 3, 6, 7, 8, 9, 10. vid. App. pp. 24, 30, 31, 36, 41, 42, 43, 47.

CHAPTER IV.

THE DIFFERENCE BETWEEN CIVIL AND SPIRITUAL JURISDICTIONS MAINTAINED BY THE CONSTITUTIONAL COMPACT BETWEEN CHURCH AND STATE.

1. Civil Power restrained from Spiritual Judgments in Saxon times.—2. Civil Power restrained from Spiritual Judgments from Conquest to reign of King John.—3. Civil Power restrained from Spiritual Judgments from the reign of King John to the reign of King Henry VIII.—4. Distinction between Civil and Spiritual Authority recognized in the reign of King Henry VIII; Edward VI; Queen Elizabeth; James I; Charles I; Charles II; William III.—5. The Coronation Oath.—6. Distinction between Civil and Spiritual Authority recognized by Law Courts and Jurists.—7. Text Writers: Bracton, Coke, Bacon, Blackstone.

It has been asserted in a volume entitled "Ecclesiastical Judgments," published under the auspices of the present Archbishop of Canterbury, when Bishop of London, to be an "original prerogative" of the English Crown to hear final ecclesiastical appeals. In meeting this assertion care shall be taken to go back sufficiently far into our country's annals lest any suspicion should remain, gendered by the high authority now questioned, that this was a prerogative which as being "an original" one could boast of a date anterior to the adverse evidence now to be put in.

1. Civil power restrained from spiritual judgments in Saxon times.

We will go therefore to the very root of the matter, and inspect the earliest legal records of our country. For this purpose it is impossible to get much farther back than the mixed Council of Brasted, held near Sevenoaks in Kent by King Withred, in the year 696. In that, among the first of our recorded assemblies, was laid down the footstone which supported all subsequent policy both as regarded the enactment as well as the execution of ecclesiastical laws. And the very first clause in the acts of that mixed Council is—

Spel. Conc. i. 194.

"Let the Church be free, and maintain her own judgments."

Kennett's Eccl. Syn. pp. 212, 213.
Spelm. Conc. i. 242.
Conc. M. B. i. 205.

It would be tedious and beyond the present purpose to show in detail how consistently this principle was adhered to in those earlier times, as for instance at the mixed Council of Cliff at Hoo, Kent, in 747, under Ethelbald, and at the Wittenagemote of Grately by Andover, under Athelstan, in 928. But as we pass on to later ages of the Saxon period it may be observed that the principle was still maintained by the laws of King Edgar. Then the bishops, and sheriffs or aldermen, presided in the County

Courts, the first for the decision of spiritual, the latter for the decision of civil suits, and the principle that spiritual questions should be restrained within the jurisdiction of the spiritual judge was distinctly expressed in the laws of that King, as follows:—

"At the most august assembly let the bishop and the alderman be present, of whom let the one interpret to the people the law of God, the other the laws of man." Leges. Edg. c. v.

The words of that same King to the assembled ecclesiastics in the year 969 enforce the same distinction between civil and spiritual authority. These were his words, which have been before quoted, to Archbishop Dunstan and his suffragans:—

"I wield the sword of Constantine, you that of Peter." Conc. M. B. i. 246.

2. Civil power restrained from spiritual judgments from Conquest to reign of King John.

And now to pass from Saxon to Norman times. We find this principle, that spiritual causes should be confined to spiritual judges, enforced with no less precision and vigour. In the charter of King William I., A.D. 1085, the following words occur:—

"Nor should any cause which pertains to the soul's health be brought before laymen. But if any man be impleaded in any cause, or for any offence under the laws of the Church, let him come to the place which the bishop shall have chosen and appointed, and there let him plead in the cause or to the offence. . . . But this I forbid, and by my authority disallow, that any viscount, or magistrate, or minister of the king, or indeed any layman, should interfere with the laws which belong to the bishop."

To pass onwards we come to the time of Stephen, who swore solemnly—

"That ecclesiastical persons should be subject only to episcopal jurisdiction." Spelm. Cod. 310.

Subsequently in the reign of King Henry II., the code known as the "Constitutions of Clarendon" was ratified in 1164. By the Constitutions of Clarendon ecclesiastical appeals were specially dealt with, and indeed the whole gradation was then distinctly laid down thus:—

"From the archdeacon process must be had to the bishop; from the bishop to the archbishop; and if the archbishop should be slack in doing justice, recourse must be had to the King, by whose order the *controversy is to be settled in the Archbishop's Court*, in such sort that no further process can be had without the Royal assent;" i.e., the parties could not appeal to Rome. Const. Clar. Matt. Par. ad ann. 1164. Labb. et Coss. ii. 1431. Conc. M. B. i. 435.

And here it is remarkable, in case the archbishop failed to do justice in the first instance, and recourse was had to the Crown, that still the controversy was to be decided in the Archbishop's Court, and not elsewhere. It was not, as before said, to be taken out of the judgment of the Church; the decision in the case was to be a spiritual one, and the proceedings governed by the methods of the Court Christian. And now to explain how the learned Barons of the Exchequer on this point, in delivering a judgment

Sup. p. 12.

Coll. Eccl. Hist. ii. pp. 274—6, and sup. pp. 46, 47.

Comm. iii. 66. on the subject of ecclesiastical appeals, fell into their deplorable complication of error on July 8, 1850. They missed their way sadly from the path of constitutional law by taking Blackstone's mutilated extract from this Constitution instead of consulting a genuine copy. For they ruled that it was "settled . . . . by the Constitutions of Clarendon in the reign of Henry II., anno Domini 1164," that appeals in causes ecclesiastical were given to the King, and no farther; than which nothing can be wider of the truth, as the constitution itself declares on the face of the record.

Judg. Ct. Excheq. July 8, 1850.

Investigating in chronological order the foundations of constitutional history, we now strike upon Magna Charta, and there we discover the groundwork of English liberty—the basis of our national rights. And what are the very first words of that time-honoured document? Magna Charta, in effect repeating the prime enactment of the Mixed Council of Brasted, thus begins:—

Mag. Car. ad. init. "Let the Church be free, and hold her rights and liberties inviolate."

3. Civil power restrained from spiritual judgments from reign of King John to reign of King Henry VIII.

And that the Church might not be left to rely solely on that great national groundwork of her liberties, its contents were continually confirmed in subsequent generations. For, to speak within the mark, we find confirmations of this charter nationally ratified twice in the reign of King Henry III., twice in the reign of King Edward I., thrice in the reign of King Edward III., eight times in the reign of King Richard II., six times in the reign of King Henry IV., and once in the reign of King Henry V.

9 Hen. III. c. 1. A.D. 1225.
37 Hen. III. A.D. 1253.
25 Ed. I. c. 1.
28 Ed. I. A.D. 1300.
14 Ed. III. c. 1.
25 Ed. III. c. 1.
50 Ed. III. c. 1.
1 Rich. II. c. 1.
2 Rich. II. c. 1.
3 Rich. II. c. 1.
5 Rich. II. c. 1.
6 Rich. II. c. 1.
7 Rich. II. c. 1.
8 Rich. II. c. 1.
12 Rich. II. c. 1.

These outworks, however, do not exhaust the aid further given to the Church's cause by the Answers in Parliament to the "Articuli Cleri" made at Lincoln, 9 Edward II., A.D. 1315, and at Westminster, 14 Edward III., A.D. 1340. The 13th chapter of the former statute, "Articuli Cleri," described by Lord Coke not merely as an enactment, but as declaratory of the common law and custom of the realm, runs as follows:—

1, 2, 4, 7, 9, and 13 Hen. IV. c. 1.
3 Hen. V. c. 1.
2 Inst. 599.
9 Ed. II. c. 13.

"Also it is desired that spiritual persons whom our lord the King doth present unto benefices in the Church, if the bishop will not admit them (either for lack of learning or for other reasonable cause), may not be under the examination of lay persons, but that they may sue to an ecclesiastical judge, to whom it of right belongs, for the obtaining of such a remedy as may be just."

And the answer is—

Coll. Eccl. Hist. iii. 45. "Of the fitness of a person presented to a benefice, the examination belongs to the spiritual judge. So it hath been heretofore used, and shall be so in future."

4. Distinction between civil and spiritual authority recognised in the reigns of King Henry VIII, Edward VI, Elizabeth, James I, Charles I, Charles II, William III.

And now to pass on to the reign of King Henry VIII. One is very strongly confirmed in the belief that the general intention of that age was to restrain spiritual decisions to spiritual authority, not only by the evidence of the public records of our country, but by the personal declarations of that monarch himself.

In the forefront of the national records of this period stands the noble preamble of the Statute of Appeals, A.D. 1533, which pretty plainly declares upon its face the legislative intentions of the times. Speaking of this realm of England, it recites as follows:— 24 Hen. VIII. 12.

"The body spiritual whereof having power when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and showed by that part of the said body politic called the spiritualty, now being usually called the English Church, which always hath been reputed, and also found of that sort that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour sufficient and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties as to their rooms spiritual doth appertain." Ibid. preamb.

In the following year, 1534, the statute known as "The Clergy Submission Act" was passed, giving final appeals in causes ecclesiastical which did not "touch the King" to the Crown in Chancery, and in fact establishing the Court of Delegates. Under the provision of that very statute a commission was appointed to revise the ecclesiastical laws, and its recommendation in the "*Reformatio Legum*" was, that when an ecclesiastical cause was referred to the Crown it should be decided by spiritual, not by lay authority. 25 Hen. VIII. 19.

"And when the cause shall have been referred" (to the Crown), "we desire to conclude it by a provincial synod, if it is an important case, or by three or four bishops to be appointed" (by the Crown) "for that purpose." Ref. Leg. Tit Appel. cap. xi.

Though, as must be confessed, King Henry VIII. was a most rapacious grasper of rights and privileges no way rightfully belonging to him, yet when the title of "Supreme Head" of the Church was statutably conferred on him, in the next session of Parliament, this over-capacious expression was by no means interpreted, even by himself (and no one can deny that he well knew how to make the best of the servile concessions of his contemptible courtiers and Parliaments), to confer authority on the Crown to give final judgment by lay authority in matters of faith. That title is explained in a much less offensive sense by a paper lately discovered by Mr. Froude in the Rolls' House MSS., the words of which run thus. The King does not— 26 Hen. VIII. 1.

"Pretend thereby to take away any power from the successors of the Apostles that was given to them by God." . . . Nor did "the King's Grace, his nobles, or subjects, intend to decline or vary from the congregation of Christ's Church in any thing concerning the Articles of the national faith." Froude's Hist. Eng. ii. 326.

And again, when King Henry VIII. was interrogated by the clergy of the province of York what was meant by the title "Supreme Head," he replied :—

Conc. M. B. iii. 764.

> "As to spiritual things . . . forasmuch as they be no worldly or temporal things, they have no worldly nor temporal head, but only Christ that did institute them, by whose ordinances they be ministered here by mortal men, elect, chosen, and ordained as God hath willed for that purpose, who be the clergy."

Nor did His Majesty's "letter of business," dated July 6, 1540, on the subject of Anne of Cleves' divorce, directed to the National Synod convened at St. Paul's, London, April 14, 1540, and afterwards prorogued to Westminster, breathe any different spirit. In the body of that instrument the following passage occurs :—

Conc. M. B. iii. 846. Ibid. 851.

Burnet'sHist. Ref. ad. an. 1540, Records in loc.

> "We, who are wont to abide by your judgment in all other weightier matters concerning this Church of England which affect ecclesiastical government and religion . . . have thought it meet . . . that explanation and communication should be made to you . . . so that we may lawfully venture under the authority of our whole Church . . . to do and effect that . . . which you may decree to be lawful according to the laws of God."

Indeed, even in this reign questions of the law Divine were acknowledged to belong to the spiritualty. For though unquestionably Acts of Parliament frequently then dealt with spiritual matters, yet it is quite evident, to those who take the most ordinary trouble to investigate dates, that such matters were first settled in the provincial synods or Convocations, and subsequently ratified by the temporal authority or by the civil Legislature.

As one instance of the truth of this assertion, may be cited "*The Ten Articles*, A.D. 1536," which when sent down into the north of England were accompanied by the original draft under the hands of the members of Convocation, signed by 116 bishops, abbots, priors, archdeacons, and proctors of the clergy. And the greatest care was taken that the people might not suppose that these documents rested on Royal or civil authority, the Duke of Norfolk, as the King's lieutenant, having received orders to take order that the clergy and others "might understand it was a proper act of the Church, and no innovation of the King and a few of his counsellors."

Strype'sMem. Cranm. p. 40.

Strype'sMem. Cranm. pp.40, 41.

Another instance may be found in "*The Six Articles*, A.D. 1539," which were incorporated into an Act of Parliament. It is no part of my present purpose to set up any defence either for that statute or for its contents, it is merely invoked here as an example, to show that spiritual questions were at this period of our history first submitted to the spiritualty, before they were concluded by the temporal power. In the case of this statute, which has been popularly denominated the "bloody bill," or "whip with six strings," the spiritual elements were formally

31 Hen. VIII. 14.

Hume,c.xxxii.

submitted to the Canterbury Convocation by Parliament. Specific questions having been handed by Thomas Cromwell into the hands of the prolocutor, were debated and particularly answered by the synod before the statute was enacted. And to set all doubt at rest in this matter, the authority of the spiritualty and of the Convocation for the doctrinal contents is twice asserted in the preamble of the statute itself.

Conc. M. B. iii. 845.

Ibid. 845, 846

31 Hen. VIII. 14 Preamb.

The real truth is, that the most serious misapprehensions have arisen in the minds of some of our modern writers from the fact of giving exclusive attention to Acts of Parliament in investigating the history of this period, while the acts of our synods have been entirely overlooked. The "*Statute Book*" has, in many instances, alone been studied, to the entire exclusion of our ecclesiastical records and the "*Concilia Magnæ Britanniæ.*" It would take far too much space to pursue this subject here into all its details, but at any rate, it shall suffice here to assert with considerable confidence that "*The Articles of* A.D. 1536,"—"*The Institution of a Christian Man,*" A.D. 1537—"*The Six Articles,*" A.D. 1539—"*The New and Expurgated Edition of the Sarum Use,*" A.D. 1542, *N. S.*,—"*The Necessary Doctrine and Erudition of any Christian Man,*" A.D. 1543, and "*The English reformed Litany,*" A.D. 1544, all had prime original synodical sanction. It must also be added, that the above recorded instruments go a long way towards absorbing the list of authoritative documents in spiritual matters published during "the later years of King Henry VIII." And so those who have maintained that at this period spiritual decisions were restrained within spiritual authority, are not without considerable warrant for what they have affirmed; nor can they be fairly taunted with having promulgated a "preconceived theory," in the sense once charged upon them. Though in another sense it certainly is a "preconceived" one, as having been held very long ago, both by Jewel and Fuller, two worthies not over favourable to ecclesiastical authority. Of these the latter thus writes to our purpose, "Upon serious consideration, it will appear that there was nothing done in the reformation of religion save what was acted by the clergy in their Convocations, or grounded upon some act of theirs precedent to it, with the advice, counsel, and consent of the bishops and most eminent Churchmen, confirmed on the post-fact, and not otherwise, by the civil sanction, according to the usage of the best and happiest times of Christianity."

Conc. M. B. iii. 817.
Ibid. 830.
Ibid. 845, 846.
Ibid. 862.
Conc. M. B. iii. 868,
Att. Rights, p. 193.

Eccl. Judg. Introduc. xxxii.

Apol. pp. 115—133, and Recapit. Apol p. 150.
Ch. Hist. B. v. p. 188.

Indeed, to go a step further, it is tolerably clear that the practice in this reign of submitting spiritual questions to the judgment of the spiritualty was not straitly confined to those cases which in this generation we denominate as of pure spiritual cognizance, but was frequently extended to those which only touched on ecclesiastical jurisdiction. As examples may be cited,

the nullification of Catherine of Arragon's marriage, which was wholly the act of the Convocations; the divorce of Anne Boleyn, which was sanctioned by the same authority; and the nullification of Ann of Cleves' marriage, which was entirely decided by the same tribunal. Indeed the latter case affords a most imposing instance of the judicial functions then exercised by the spiritualty.

Conc. M. B. iii. 756, 7, 9. Ibid. 803,804.

Ibid. 851—4.

One really must believe with all the foregoing evidence before us, that at the period under consideration, a question of faith or doctrine would not have been submitted to lay adjudication either in the enactment or administration of law.

In the reign of King Ed. VI.

It would lead us too far out of the direct track, our present inquiry referring more specially to the execution than to the enactment of ecclesiastical law, to enter into the detail of the national proceedings in King Edward VI.'s reign as they affected the Church. But it is at least proper to mention in passing, that during that period spiritual questions were restrained to the spiritualty. And this is none the less necessary on account of the unwarrantable assertions which have been made of late in this particular. The authority "*to administer the Communion in both Kinds*," A.D. 1547—*The abrogation of the Celibacy of the Clergy*, A.D. 1547,—"*The first Reformed Prayer Book*," A.D. 1549—"*The Second Reformed Prayer Book*," A.D. 1552, and "*The Articles of* A.D. 1553," *N. S.*, as indeed appears by their title, the thirty-fifth of which ratified the Second Book, all these had direct synodical sanction. And the foregoing exhaust the list of the most important authoritative national instruments affecting spiritual matters promulged during King Edward VI.'s time.

Conc. M. B. iv. 16. Strype's Cranm. pp. 155, 156. 2 & 3 Edw. VI. 21. 5 & 6 Edw. VI. 12. Conc. M. B. iv. 15—35. Coll. Eccl. Hist. v. 342; vi. 277. Att. Rights, pp. 199—202. 35th Art. of 1553, N.S. Card. i. 18. Wake's Pres. State, 599. Coll. Ch. Hist. v. 476. Heyl. Hist. Ref 121.

It is, moreover, a matter well worthy of attention, but one which has been most strangely overlooked, that the two Commissions which severally prepared "*The Reformed Communion Office*," and "*The first Reformed Prayer Book*," in this reign, consisted wholly, and without one exception, of Convocation-men. That both were composed solely of members of the Upper and Lower Houses of the Canterbury Synod, is indeed clear beyond doubt from the records of their names and offices. It is further observable that Cranmer, President of the Upper House, and Taylor, Prolocutor of the Lower, sat on both commissions, which were not, however, identical as regarded all the other members.

Coll. v. 246. Sparrow's Rationale, App. 149. Strype's Mem. 157.

In the reign of Queen Eliz.

To pass over the next succession, from which at least no evidence can be produced against the position now maintained, and any evidence produced in favour of it would now probably be somewhat generally disallowed, we come to the time of Queen Elizabeth.

After the tyrannical oppressions under which the English Church groaned in the time of Queen Mary, the reintroduction of our Prayer Book, with some few alterations, at the beginning of the reign of Queen Elizabeth, was sanctioned by statute, the

debates on the subject taking place in the two Houses of Parliament in April and May, 1559. Now, as sundry alterations made in that book at this time are set out in the Act, it has been supposed by some persons that the changes were affected on this occasion in our Liturgy solely by parliamentary and not by ecclesiastical authority; and the fact that the Convocation Registers were burnt in the disastrous fire of London in 1666, has rendered any satisfactory investigation of this subject extremely difficult. There is, however, a document existing in the State Paper Office which I have been so fortunate as to discover, assigning a proper synodical sanction to the liturgical changes then made. That document, if genuine and authentic, tends so directly to corroborate the position now maintained, that it shall be transcribed. It first sets out the names of the bishops in the first year of Queen Elizabeth's reign, and then proceeds in the terms following:— 1 Eliz. 2. Sec. 3.

"The Book of Common Prayer, published primo Elizᵉ, was first resolved and established in the time of King Edward VI. It was re-examined, with some small alterations by the Convocation, consisting of the same bishops and the rest of the clergy, in primo Elizᵉ, which being done by the Convocation, and published under the Great Seal of England, there was an Act of Parliament for the same book, which is ordinarily printed in the beginning of the book. Not that the book was ever subjected to the censure of the Parliament, but being agreed upon and published as aforesaid, a law was made by the Parliament for the inflicting of a penalty upon all such as should refuse to use and observe the same. Further authority thereto is not in the Parliament, neither hath been in former times yielded to the Parliament in things of that nature, but the judgment and determination thereof hath ever been in the Church thereto authorized by the King, which is that which is yielded to Henry VIII. in the statute of 25 his reigne." State Paper Office MSS. No. 46, Vol. 7, Domest. Eliz. 1559.

This State Paper is in the handwriting of Sir Thomas Wilson, the first Keeper of the State Paper Office, established by King James I. in 1608, and the date of the document may therefore thus be approximately assigned. Having first detailed the names of the Bishops who, from banishment, returned to England on the death of Queen Mary and the accession of Queen Elizabeth, and having also referred to the first establishment of the Book of Common Prayer in the time of King Edward VI., this Paper proceeds to affirm "that it was re-examined with some small alterations by the Convocation, consisting of the *same* Bishops and the rest of the Clergy, in primo Elizabethæ." Upon this evidence therefore it appears, while it is admitted that the Elizabethan Prayer Book was not submitted to that Convocation which met Jan. 24, 1559, concurrently with Queen Elizabeth's first Parliament, yet that the Book was authorized by a Synod or Convocation of English Bishops—unjustly and uncanonically deprived in the last succession, but now restored to their rightful authority—and of the rest of the Clergy. It is moreover to be observed, that this conclusion is strongly supported by the contents of the preamble to the Conc. M.B. iv. 179. Strype's Ann. i. 56.

13 & 14 Car. II. 4. present Act of Uniformity, where the Elizabethan Prayer Book is distinctly said to have been "compiled by the Rev. Bishops and Clergy."

In any case, this State Paper, considering the methods of reasoning employed, is available as very considerable evidence that, at the date which may approximately be assigned to it, principles identical with those now contended for were adopted in high quarters. For here we find spiritual decisions restrained to spiritual authority. And it is further worthy of remark, that at this period the offensive title of "Supreme Head" of the Church, which had been grasped by King Henry VIII., was 26 Hen. VIII. 1, abandoned. For when the Supremacy Act, repealed in the reign of Queen Mary, was partially revived in the reign of Queen Elizabeth, though not wholly (as some gentlemen of the learned profession would have us believe), yet, certainly, in some considerable measure of its intention, the much less surprising title of 1 Eliz. 1. 10. "Supreme Governor" was substituted for that of "Supreme Head." And even lest that less objectionable term should appear to challenge defining authority for the Crown in matters spiritual, Her Majesty thought fit by her Royal Injunctions to disclaim such power in the words following:—

Eliz. Inj. Spar. Coll. 83. Conc. M. B. iv. 188. "Certainly Her Majesty neither doth nor ever will challenge any authority than that was challenged and lately used by the noble Kings of famous memory, King Henry VIII. and King Edward VI., which is and was of ancient time due to the Imperial Crown of this realm, that is, under God to have the sovereignty and rule over all manner of persons born within these her realms, dominions, and countries, of what estate, either ecclesiastical or temporal, soever they be, so as no other sovereign power shall or ought to have any superiority over them."

And this Royal Injunction was statutably ratified by Eliz. 5, c. 1, sec. 14.

So here again we find the civil power restrained to sovereignty over persons, to the exclusion of Roman assumption in this land, and confined to that measure of authority due of ancient time (and we have seen above what that was) to the Imperial Crown of this realm. And such measure of authority most unquestionably never extended anciently to arbitration in questions of faith.

Conc. M. B. iv. 232. Card. Syn. i. 53, Tit. Bennett's Essay, p. 211. Again, to glance at two most important matters in this reign. The Articles of 1563, N.S., and those of 1571, had the fullest and most unquestionable authority of both our provincial synods.

Sup. p. 107. And here may be quoted the contents of those Articles themselves; because, although, for reasons before specified, one would not introduce any ecclesiastical authority in proof of the points before us, yet it must be remembered that these Articles were 13 Eliz. 12. ratified by Crown and Parliament, and so were stamped with

the seal of Imperial authority. The 20th of those Articles runs thus:—

"The Church hath power to decree rites and ceremonies, and authority in controversies of faith." Art. of Religion xx.

And the 37th runs thus:—

"Where we attribute to the Queen's Majesty the chief government, by which titles we understand the minds of some slanderous folk to be offended, we give not to our princes the ministering either of God's Word or of the Sacraments, the which thing the Injunctions also lately set forth by Elizabeth our Queen do most plainly testify, but that only prerogative which we see to have been given always to all godly princes in Holy Scripture by God Himself: that is, that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil-doers." Ibid. xxxvii.

And that Queen Elizabeth had a deep personal consciousness of the impropriety and inconvenience of submitting spiritual questions to lay authority, we may learn from a message sent by Her Majesty to the House of Commons on May 22, 1572, in these terms:—

"Her Highness' pleasure is, that from henceforth no bills concerning religion shall be preferred or received into this House unless the same should be first considered of and liked by the Clergy." D'Ewes' Journal, p. 213.

Nor does Her Majesty's mind appear to have undergone any change on this subject subsequently, in 1593. In fact, she somewhat rose in her language, for when the customary request for liberty of speech was made by Sir E. Coke, then Speaker of the House of Commons, this answer in the Queen's name was returned by the Lord Keeper Puckering:—

"Privilege of speech is granted, but you must know what privilege you have, not to speak every one what he listeth, but your privilege is 'Yea' or 'No.' Wherefore, Mr. Speaker, Her Majesty's pleasure is that if you perceive any idle heads . . . . . which will meddle with reforming the Church and transforming the Commonwealth, and do exhibit any Bills to such purpose, that you receive them not until they be viewed and considered of those who, it is fitter should consider of such things, and can better judge of them." D'Ewes' Journal, Lords p. 460. Coll. vii. 162, 163.

And when subsequently Queen Elizabeth had been advertised of some approaches in Parliament towards matters ecclesiastical which were discordant with the tenor of these injunctions, she sent for the Speaker himself into her presence, and among other items commanded him to deliver in substance the following message to the Commons:—

"That the Lord Keeper had acquainted the Lower House that it was the Queen's pleasure they should not meddle with . . . . causes ecclesiastical; that she wondered any could be of so high commandment," as she speaks, "to attempt a thing so expressly contrary to what she had forbidden, and that she was highly offended with this liberty." And lastly, she charged the Speaker to tell them that it was her "express command that no bill touching . . . reformation in causes ecclesiastical be exhibited." "And upon my allegiance," continued the Speaker to the House, "I am commanded, if any such bill be exhibited, not to read it." Coll. vii. 163.

In the reign of King James I.

To pass on in chronological order to the next reign, we find that King James I. in his apology for the oath of allegiance, contributed his testimony to the ancient constitutional principle that the regal power should not interpose in matters of pure spiritual cognizance; and his testimony is the more valuable as having been delivered in the times of high Royal prerogative. His Majesty's words are as follow:—

King James I. Apol. Oath Alleg.

"I never did, nor will presume to create any article of faith, or to be judge thereof, but to submit my exemplary obedience to them (i.e. the hierarchy), in as great humility as the meanest of the land."

And the principle here enunciated was most strictly adhered to in the enactment and promulgation of the canons of this reign in 1603-4, which had the sanction of our two provincial synods signified in the most exact and comprehensive manner imaginable.

Conc. M.B. iv. 380, 428.

This monarch also manifested his extreme unwillingness to allow spiritual authority to be interfered with by civil authority, when he compelled all the judges to account before his council for their misbehaviour in impeding the business of Ecclesiastical Courts by prohibitions from the Common Law Courts.

Before taking leave of King James I., it is worth while to quote a State Paper of his reign, which shows that at any rate in some high quarter, there was then a great unwillingness either to claim or allow those extravagant assumptions of regal power which have been of late so sedulously asserted. That paper, after setting out the King's duties in regard to ecclesiastical matters, proceeds—

State Paper Office MSS. Domest. 1604, No. 45.

"As for the title of Head of the Church, which Stephen Gardiner and other Popish bishops gave first to King Henry VIII., meaning thereby supreme judge of faith and discipline, we utterly disavow it in that sense. And though a good construction might be made of the word when Saul is called (1 Sam. xv.) head of the tribes of Israel; and David (2 Sam. xxii.) head of the heathen; and Theodosius, by Chrysostome, head of all men, yet, because Supreme Head of the Church is a title in Scripture appropriated to Christ, and doth not belong to princes without many mitigations and cautions, we forbear it, and use a lesse offensive stile, Supreme Governor of his realmes, &c., thereby signifying the King's sovereign power to command for truth, and undeniable right of bearing the sword, to execute justice upon all persons within these realms, in all causes as well ecclesiastical as civil."

In the reign of King Charles I.

To take another step onward; the Royal Declaration prefixed to the "Thirty-nine Articles" in King Charles I.'s reign, and pledging subsequent Sovereigns of this realm by its continued presence, clearly restrains spiritual questions to spiritual arbitration. The words are as follow:—

Pref. to Thirty nine Articles.

"If any difference arises about the external policy concerning the injunctions, canons, and other constitutions whatsoever thereto (i.e. the Church) belonging, the clergy in their Convocation is to order and settle them."

In the reign of King Charles II.

The principle that authority in matters of faith should be restrained to the Spiritualty was most distinctly and emphatically proclaimed by the methods nationally adopted in the establishment of our present Book of Common Prayer in the reign of King Charles II. The precedent of that time should be carefully remembered, and one hopes will be closely followed should any future like occasion arise. In 1661, a revision of the English Liturgy being thought desirable, the work was committed to the two Convocations of Canterbury and York. The Archbishop of York, the Bishops of Carlisle, Chester, and Durham, together with six proxies for the Lower House of York attended in London: and the Convocation of Canterbury, thus fortified, revised the Prayer Book itself, and the Calendar also, by the aid of MSS., and the assistance of persons of mathematical eminence. When the whole work had been concluded, a copy of the Revised Book, engrossed with a precise specification of the volume as containing five hundred and forty-four pages of matter, was subscribed personally under the hands of the Archbishop of Canterbury, eighteen Bishops and eighty-four Presbyters of the Canterbury Synod. And that the Northern Province might waive no substantial right, a separate form of assent and consent was subscribed personally by the Archbishop of York, the Bishops of Durham and Carlisle, and by the six proxies formally deputed for the purpose by the York Synod.

Conc. M. B. 4, 567.

Ibid. 568.

Ibid. 569.

Kennett's Regist. p. 566.

Ibid. 574.

Syn. Ang. ii., 93, 95.

Conc. M.B. iv. 566.

Nicholl's Pref. x. xii.

When this Book was afterwards offered to the Legislature in order that legal authority might be appended to it, "there was no change made in a tittle by the Parliament, so that they only enacted by a law what the Convocation had done." And, moreover, the Lord Chancellor in the name of the House of Lords thanked the Archbishops and Bishops of both Provinces, for the great attention they had given to the subject; and, further, his Lordship desired the Archbishop of Canterbury to convey to the Prolocutor and to the Clergy of the Lower House of Convocation the thanks of the Upper House of Parliament, for the care and industry bestowed on the revision of the Book of Common Prayer.

Burnet, Hist Ord. Ch. Eng. p. 75.

Syn. Ang. II., 106.

Thus, at the period of our history now under view, principles which seem at the present day to be in some quarters lightly esteemed, were nationally adhered to with considerable tenacity.

In the reign of King William III.

Nor do the changes consequent upon the Revolution of 1688 appear to have shaken the national determination which had previously prevailed, of committing Spiritual questions to Spiritual authority; but which has of late been challenged in some quarters with surprising pertinacity. At the beginning of the reign of King William III., when, if ever, one would have expected that the ancient land-

marks of our constitutional Government in Church and State, might have been overlooked, the principle of submitting Spiritual questions to Spiritual arbitration was rigidly adhered to. For in 1689, when a scheme was set on foot for a revision of the Liturgy in order to comprehend persons dissenting from the Church, though the Dissenters wished that the matter should be settled in Parliament, yet the House of Commons was of a very different opinion, and determined that the Convocation was the proper place for the consideration of Ecclesiastical affairs. Consequently the House of Lords joined with the House of Commons in an address couched in the following words to the Throne :—

Kennett, Comp. Hist. iii., 589.

Lathbury, Hist. Conv. p. 321.

"We likewise pray that according to the ancient practice and usage of this Kingdom in time of Parliament, your Majesty will be graciously pleased to issue forth your writ as soon as conveniently may be, for calling a Convocation of the Clergy to be advised with in Ecclesiastical matters."

In accordance with the prayer of this address of both Houses of the Legislature, the Convocation writs were issued; and to prepare the way for Synodical action, a Royal Commission was appointed of persons who were to consult together and make suggestions on matters connected with the external worship of the Church. And here it is to be observed that that Commission was composed wholly of Spiritual persons, without any admixture of laymen, a precedent which has not been followed on a like late occasion, when a ritual Commission was appointed, exhibiting another instance of our modern disregard of ancient and venerable precedents. And though, in consequence of unacceptable suggestions made by the Commissioners, this "Comprehension Scheme" came to nothing, having been most properly opposed by the Lower House of the Convocation of Canterbury, yet the whole history of the proceedings contributes unanswerable evidence to the fact that at this time the great principle of submitting Spiritual questions to Spiritual arbitration was maintained inviolate by national determination as expressed through the acts of the Houses of Lords and Commons, and of the Crown itself.

Kennett, Comp Hist. iii., 590.

In the "Bill of Rights" there is again set forth a virtual repetition of that memorable enactment, "Let the Church be free, and maintain her own judgments," which was at the very root of our constitutional history, established by the mixed Council of Brasted, and successively confirmed, as above shown, generation after generation. For the "Bill of Rights" reprobated the relegation of spiritual causes to a tribunal of civil origin in these unmistakable words :—

Spelm. Conc. i. 194.

Sup. p. 18 seq.

1 Will. and Mary, c. 2. s. 36.

"The Commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of a like nature, are illegal and pernicious."

5. Coronation oath.

And lastly, this subject of legal enactments and constitutional engagements defining the relations which justly exist between the Church and the State, may be properly summed up by a reference to the Coronation Oath taken by every Sovereign who under our present laws has ascended the throne of these realms. "Will you," inquired the Archbishop on such august occasions, "preserve unto the Bishops and clergy of this realm . . . all such rights and privileges as by law do or shall appertain unto them, or any of them?" "All this I promise to do," has been the answer; and then, touching the holy Gospels, the Sovereign has added, "The things which I have here before promised, I will perform and keep, so help me God;" and then has kissed the book. And it must further be added, that "all constitutional transactions between the Crown and subject are both essentially and formally legal covenants, kings and people alike obeying the supremacy of the law;" and also, that "the oath is deposited in the Chancery, to be produced against the Sovereign should the compact be infringed."

1 Will. and Mary, c. 6. Blackst. Com. i. 235.

Palgrave, Hist. of Norm. and Eng. p. 87.

6. Distinction between Civil and Spiritual authority recognized by Law Courts and Jurists.

But not only may it thus be shown from the public records of this nation, such as Acts of Great Councils, Royal Charters, Declarations of Sovereigns, Civil Constitutions, Acts of Parliament, and other constitutional instruments, that the State has solemnly pledged itself, over and over again, to leave the Church's "judgments free," we may also learn from decisions of the Law Courts that this principle has been admitted as the basis of their judgments.

In Specot's case the Court of King's Bench ruled that—

"It doth not appertain to the King's Court to determine schisms and heresies" (but if the original cause of the suit be matter whereof the King's Court hath cognizance, i.e. one involving rights of property), "then a schism or heresy ought to be alleged in certain, to the intent that the King's Court may consult with divines to know whether it be schism or not."

5 Coke's Rep.

The Common Law of England, in the matter of prohibitions, may be relied on as supporting this principle before us. It is distinctly laid down that—

"If the ecclesiastical or spiritual Courts proceed only on their own canons, they shall not be prohibited by the Common Law, for they shall be presumed to be the best judges of their own laws."

2 Roll. Rep. 439. 1 Bulst. 159.

And again—

"When the ecclesiastical Court has the sole cognizance of a cause, their proceedings are not examinable at Common Law, though erroneous, and no prohibition will lie."

March. 92.

And again—

"If a matter is properly determinable in the spiritual Courts, and they make an erroneous decree, the King's Bench will not grant a prohibition."

2 Lill. 386.

And so completely does this principle appear to have possessed the mind of one of the most upright of our Judges, that according to a report of Lord Raymond, Chief Justice Holt declared to him, on the occasion of an appeal to the House of Lords in such a case, "that if the Lords had been of opinion that the prohibition ought to have been granted, he never would have granted it."

Eccl. Judgments, p. 345.

Eight out of the twelve Common Law Judges in Queen Anne's time, together with the Attorney and Solicitor General, added the weight of their authority to enforce the principle that Spiritual questions should be decided by Spiritual authority, when they gave the following opinion on a case submitted to them by the Crown :—

Card. Syn. 2. 761, 762.

"We humbly lay before your Majesty, that all our law books that speak of this subject, mention(ing) a jurisdiction in matter of heresy and condemnation of heretics as proper to be exercised in Convocation. . . . . And none of them that we find making any doubt thereof."

7. Text Writers–Bracton, Coke, Bacon, Blackstone.

One cannot wonder that such and such like should be the judgments of the Courts and Judges when it is remembered that they are supported by the accumulated authority of our most reliable text writers, some of whom shall now be produced as evidence.

Bracton, in his most methodical and accurate treatise on English law, when speaking of the distinction between civil and ecclesiastical jurisdiction, says :—

Lib. v. c. 2, p. 401, Lond. 1569.

"Since there are these separate jurisdictions, separate judges, and separate causes, it behoves each one first to consider whether the matter lies within his own jurisdiction, lest he should seem to intrude his sickle into another's crop."

And again, in the same sense, he writes :—

"It does not belong to the King nor to the secular judge to enjoin penance, nor does it belong to them even to take cognizance of those questions which are connected with spiritual affairs."

Sir Edward Coke thus delivers his opinion on this subject :—

4 Inst. 74, p. 321.

"Certain it is that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the justices of the temporal Courts and the ecclesiastical judges have kept themselves within their proper jurisdictions, without encroaching or usurping one upon another. And where such encroachments or usurpations have been made, they have been the seeds of great trouble and inconvenience."

He also left us his testimony in these words, with reference to a case of *quare impedit* :—

"If the cause of refusal to institute be spiritual, the Court shall write to the metropolitan to certify thereof."

Lord Bacon, speaking of questions touching the law divine, writes that they should be—

Works, vol. ii. pp. 512, 513.

"Left to the holy wisdom and spiritual discretion of the master builders and inferior builders in Christ's Church."

Sir William Blackstone has thus laid down the law in his Commentaries—

"If the cause be of a spiritual nature [as heresy, particularly alleged], the fact, if denied, shall be determined by a jury, and if the fact be admitted or found, the Court, upon consultation and advice of learned divines, shall decide its sufficiency." Com. vol. i. p. 389.

With the foregoing evidence before us, patent on the records of the country, and handed down under the sanction of the most trustworthy authorities, it is not only quite clear that it is no "original prerogative of the Crown" "to hear final appeals in matters ecclesiastical;" but it is also tolerably evident that the British legislature in professing to constitute a spiritual judge by Act of Parliament, and that the present Justices of the Queen's Bench and the Lord Justices of Appeal, though professed exponents of the law, when announcing that a spiritual judge could be constituted by Act of Parliament must have had some very confused and hazy notions (if indeed they had any at all) of the distinction between civil and spiritual jurisdictions, as of old maintained by the constitutional compact, and further it is plain that the final Appeal Court in ecclesiastical cases is constituted in direct contravention of that compact, as interpreted by the highest judicial authority.

Eccl. Judgments, Introd. lxiv.

P. W. R. A.

Vid. App. A.

CHAPTER V.

ECCLESIASTICAL APPEALS IN OTHER COUNTRIES.

1. Introductory.—2. Ecclesiastical Appeals in Greece.—3. In Russia.—4. In Belgium.—5. In France.—6. In Scotland.—7. Ecclesiastical Jurisdiction in the United States of America.

1. Introductory. It now becomes matter of interest to inquire into the subject of Ecclesiastical Appeals in foreign countries—this being distinctly borne in mind, that in this country the decisions of the highest spiritual authorities are subject to reversals by a Court quite unsuited by character and qualifications for such functions, not only as being composed exclusively of laymen, but as consisting of persons for whose competence in theological acquirements there is no guarantee whatsoever, and who, moreover, may be all dissentients from the faith of the Church of England.

For the purpose of prosecuting this enquiry, one may fairly take the examples of countries essentially varying in their ecclesiastical and constitutional conditions, as for instance, (1) of Greece and Russia, where branches of the primitive and most venerable Eastern Church are established; (2) of Belgium and France, where the less ancient Roman Communion prevails; (3) of Scotland, where a still more modern system of Ecclesiastical Polity receives the sanction of secular law; and lastly, (4) of the United States of America, where, under the latest developments of Republican policy, the recognition of a national faith is discarded, and any special preference of the State is denied to every form of religion whatsoever. And if it shall be shown to be a fact, that under these varying circumstances, and in these civilized countries, which present so many diversities of conditions, no such blot upon national jurisprudence in this respect can be found as offends in England; then one may fairly hope that if for no other reason, yet out of simple respect to our national character, all those who deprecate a just charge of legislative barbarism, will each help according to his means to have that blot erased.

2. Ecclesiastical Appeals in Greece. To begin, then, with the kingdom of Greece, where a branch of the most ancient Eastern Church is established. For our inquiries may not only be reasonably directed thither first, on account of the antiquity of its origin, but because that Church, having freed itself from subjection to any foreign supremacy, holds relations to the Greek

nation and its civil government in close analogy with those which exist between the Church and the State in England.

In Greece the "Holy Synod" is the Final Appeal Court in Ecclesiastical causes.

Formerly the Church of Greece was subject to the Patriarchal Throne of Constantinople. But since an independent Greek nation has been established the Church of Greece has also asserted its nationality and its independence on any foreign jurisdiction. In fact it has been formally acknowledged to be as independent as the Church of Constantinople itself; the "*Tomo Sinodale*," the Ecclesiastical Charter of the Church of Greece, in effect declaring its full independence on the one hand, and on the other its inseparable union as to doctrine with the other Churches of the same communion. Col.Ch.Chron. No. 224, p. 64.

The hierarchy in Greece is composed of twenty-four prelates—one Metropolitan residing at Athens, ten Archbishops, and thirteen Bishops. Independent of each other in all matters relating to the discharge of their Episcopal duties, they are subject to no other appellate authority than that of the "Holy Synod," the judgments and ordinances of which they are bound to obey. And as each Bishop has to govern his diocese according to the Ecclesiastical ordinances and canons, so he is responsible to the "Holy Synod" for any thing done contrary to those regulations. In the correction of Clerical misdemeanours, he passes, in conjunction with four of the clergy themselves, judgment, and inflicts penal discipline on such as commit offences punishable by the Canons. If such Episcopal judgment involves suspension from ministerial functions for seven days only, the sentence is final, and there is no appeal; but all decisions and judgments of graver consequence are either submitted to the "Holy Synod," or may be carried thither on appeal.

That Synod is a permanent body, having the spiritual government of the orthodox Church of Greece. Being the highest Ecclesiastical power in the kingdom, it bears the title of the "Holy Synod of the Church of Greece," and holds its sittings at Athens. It is composed of five members, whose votes are reckoned equal. The Metropolitan of Athens is always President, the four other members are appointed by the Government annually in succession from the prelates of the kingdom according to the dates of their consecrations. Besides these members of the Synod a Government Commissioner (as we shall hereafter see is also the case in Russia) is always present during the sittings, having no vote, but affixing his signature to the minutes of all the acts and decisions of the assembly. Off. Rep. Greek Minister of Public Worship. Vid. inf. p. 38.

As the duties of the Synod, following the ancient division of Ecclesiastical Jurisdiction by the Emperor Constantine, are separated into "internal," that is, such as are spiritual and belonging Mosh. Eccl. H. p. 141. Helms.

to the Church independently of the State, and "external," that is, such as respect the State and the civil rights of the people, so the Synod cannot fulfil all its functions without the knowledge and concurrence of the Government. But in all affairs purely Spiritual the Holy Synod exercises final superintendence and control; and to it "as a Supreme Court of Appeal" are carried, if needful, judgments of the Bishops affecting Ecclesiastical persons, and regarding misbehaviour of the Clergy under their respective jurisdictions.

Off. Rep. Greek Minister of Public Worship.

In the matter of punishments inflicted by the Holy Synod the State retains in its own hands a power, though one perhaps not frequently exerted, of limiting their severity. As a Bishop associated in his consistory with four presbyters can only suspend an offender for seven days without reference to the "Holy Synod," so the Synod itself can only inflict temporary suspension or imprisonment for fifteen days without civil authorization. A sentence adjudging punishment for a longer period requires the sanction of the State ministers; and if it extends beyond two months, as for instance in the case of deprivation, then the approval of the Sovereign is required. But it is distinctly to be understood that this involves no right of appeal on the merits of the case against the Ecclesiastical judgment. It is merely a power reserved by the State of restraining severity of sentence on Conviction.

It is too frequently the habit of the inhabitants of rich and powerful countries to regard the institutions of less fortunate nations with somewhat contemptuous feelings; but this at least may be said with perfect truth, that the ancient home of Lycurgus and Solon has certainly succeeded in devising a system of Ecclesiastical appeal, which by contrast may well raise a blush for the clumsy burlesque on legislation which disfigures the Statute Book of England, and is at once an offence to the Church and a discredit to the State.

3. Ecclesiastical Appeals in Russia.

The Final Court of Ecclesiastical Appeal in Russia is the "Holy Governing Synod." In former times appeals from the Church in Russia lay to the Patriarch of Constantinople, as in the middle ages an appellate jurisdiction over this Church of England was claimed by the See of Rome. However, as both the Church of Russia and the Church of England have respectively asserted their independence on any foreign jurisdiction, it is a matter of some interest to observe the contrast between the changes effected in the two countries, and to mark the substitution made in each case for the foreign authority which has been discharged. And here it must be confessed that whether those changes are looked at from an Ecclesiastical or Civil point of view, neither English divines nor English statesmen have any great reason to be proud of the comparison.

From the similarity of the circumstances affecting England and Russia in several particulars connected with our subject, an interest arises which will be a sufficient excuse for treating this matter at some length.

The history of the Russian Church in respect of discipline divides itself into four periods.

1. (988—1240.) A Church in full dependence on the Church of Constantinople. MS. supplied by an accredited authority.

2. (1240—1589.) A Church gradually acquiring independence with consent of the Patriarch of Constantinople.

3. (1589—1721.) An independent branch of the Holy Eastern Orthodox Catholic Church, subject to its own Patriarch.

4. (Since 1721.) An independent branch of the Church as before, but now consisting of a union of Provinces and Dioceses under Synodical government. And it is observable that the Russian Church, in the principle of this its later form of government, though not in the method of applying that principle, is identical with our own.

988—1240. During this first period the Russian Church held the position of one of the Greek "Metropolia," and was governed by a Metropolitan, who had authority over all the Russian Bishops—though himself subject, in accordance with the twenty-eighth Canon of the Fourth Œcumenical Council, to the Constantinopolitan Patriarch—and was both elected and consecrated at Constantinople. Conc. Chalc. Can. XXVIII.

1240—1589. During this second period the Russian Metropolitans increased in importance and independence. In the early part of this time they were mostly elected in Russia, though still they were obliged to receive confirmation from the See of Constantinople. But during the later part of this period, that is after the year 1452, when Turkish oppression rendered intercourse with the Greek Christians difficult, the Russian Metropolitans ceased to visit Constantinople, and were consecrated as well as elected in Russia; so that the Russian Church thenceforward became *de facto* autocephalic, being only *de jure* dependent on the Patriarch of Constantinople.

1589—1721. At the beginning of this third period the independent Patriarchate of Russia was formally instituted, and was framed after the pattern of the Alexandrian, and not of the Constantinopolitan model; the Russian Patriarch electing not the Metropolitans only, in accordance with the Constantinopolitan rule, but all the local Bishops also, in accordance with that of Alexandria. It is also observable, that in Russia Metropolitans had only a precedence of title and honours, the Bishops being equal to them in point of authority.

Since 1721. This fourth period witnessed the establishment

of the "Holy Governing Synod," which was instituted with authority equal to that of a Patriarch.

Thus, by considering the changes which took place during these four periods, we see that the Russian Church has existed under three forms of government. (1) The Metropolitical, under a twofold aspect; (2) the Patriarchal; (3) the Synodical. This last form of Ecclesiastical polity it maintains at this hour. And as in this respect it resembles our own Church, at least in its principle of government, we may reasonably inquire with peculiar interest into the constitution of its final Court of Appeal.

That executive tribunal of last resort, as before said, is the "Holy Governing Synod," the same body which is directly charged with the supreme legislative authority over all Ecclesiastical affairs in Russia. Temporary Councils having been found insufficient for the regulation of the Church, this standing permanent Council, when first established in 1721, was invested with all coercive jurisdiction which had immediately before resided in the Russian Patriarch. Its establishment was cordially acquiesced in by Jeremiah, Patriarch of Constantinople, and by Athanasius, Patriarch of Antioch. At its first institution it was not constituted exactly on the same model as that which now prevails. It is needless here to specify the particular modifications which have taken place; it will be enough to describe its constitution as at present existing.

γράμματα received Sept. 1724.

As a local permanent Council of the Russian Church, the "Holy Governing Synod" is composed of the highest dignitaries; Prelates of the Episcopal Order representing the regular body of the Clergy, and Presbyters representing the secular Clergy. At this time seven members only constitute the assembly, with power to add to their number; a power which, as some think, might not unreasonably be exerted.

In accordance with the examples of the Ancient Councils of the Church, at which, after the connexion between Church and State, in the reign of Constantine, an emissary of the emperor was wont to be present as a medium of communication between the Ecclesiastical and Civil authority, the Holy Governing Synod is attended by an "Ober-Procurator," appointed by the Czar. But this officer, as being a layman, has not even a deliberative, much less a decisive voice on any matter in the Synod; and in token of this incapacity, when the members are in Sessson he sits at a separate table. And this restraint on his interference with spiritual questions is in exact accordance with the principles enunciated by the early Christian emperors, as has been shown at length above. In fact the Ober-Procurator has no power of himself, nor can he act from the person of the Czar without his written authorization. The Ober-Procurator's duties are generally to arrange legal documents, and to be the medium between the

Vid. sup. chap. II.

spiritual and lay authorities by presenting the Synodical decrees to the emperor, by acquainting the Synod with his observations thereon, and by acting the part of Synodal agent in corresponding with the different departments of the Civil Service. He also superintends the due observance of the law in all matters relating to the departments of Education and Finance which are attached to the Synod.

The duties of the Synod may be comprised under the following heads :—To superintend the propagation and preservation of the orthodox faith ; to examine theological works ; to solve doubtful questions of doctrine ; to superintend the construction of places for worship and pious devotion ; to choose candidates for vacant Sees, and consecrate those who have received the Imperial assent ; to decide in final resort on cases relating to marriage and Church discipline ; generally to settle all cases brought up from the lower spiritual Courts ; and, finally, to superintend matters relating to the use and arrangement of Church property, and to keep account of all sums allowed by the imperial treasury for Church purposes.

Further : the Synod has authority to draw up new enactments when circumstances require them. But this authority is limited on the one side by the Apostolical Canons, Œcumenical Councils, and Patristic rules, which it is bound to preserve inviolate, and on the other by the Civil power, from which the Synod receives authorization on each occasion when it makes new regulations.

Lastly : the Czar himself gives his formal assent and consent to the acts of the Synod ; and though thus it would seem at first sight that he has the power constitutionally of putting his veto on them, yet in reality he has no such power, being now limited by the terms of his own corporal oath which he takes at his coronation. And it is said moreover as a fact, that there is no one instance on record where the Emperor has contravened a decision of the "Holy Governing Synod."

Such is the tribunal which decides final Ecclesiastical appeals in Russia. In the words of Peter the Great : "All other subjected Courts and persons receive the commands of the Synod, and refer to it with their petitions, reports, and informations." Its authority is set forth in the "Reglamentum Spirituale," i.e. the Russian Canonical Code, as follows :—"We do command all the orders of the clergy and the laity to hold this as a solemn and powerful Government, and to seek from it all final decisions and sentences in matters spiritual, and to be content with its judgment, and in every thing to obey its enactments." This tribunal is, by its constitution, well adapted for these assigned duties, and by contrast exhibits in no very advantageous light the indefensible Court accidently established for the same purpose in our own country.

"Ch. Gov. in Russia." Rivingtons, 1867.

4. Ecclesiastical Appeals in Belgium.

In the case of Belgium a few words will suffice. There is no Court of Final Ecclesiastical Appeal held within the limits of that country. The Bishops are all appointed directly by the Pope, without reference to the State or Crown, and the Clergy are entirely under the control of those Prelates, who, by the way, are said to exercise a somewhat rigorous sway over such as are committed to their superintendence. Consequently, in matters of faith and clerical discipline, the final appeal lies directly to Rome. Now, without in the least degree committing oneself to an approval of such a method of redress, which is wholly unprimitive, and directly opposed to the most worthy precedents of historical antiquity, yet for our present argument the fact is instructive, as showing that the Hildebrandine theory of spiritual discipline and government as accepted by the Roman Church in Belgium is no way interfered with by State authority.

5. Ecclesiastical Appeals in France.

The principles of French legislation on the subject before us carefully guard the rights, both of the Church and of the State—the rights of the Church as they respect matters of faith, the rights of the State as they respect the just liberties of the subject. Both are equally secured in France; and as her legislation touching Ecclesiastical appeals bears upon it the impression of much wise thought and careful consideration, and, moreover, as it has been fully treated of by lawyers and theologians of the highest reputation, it might very easily, and beyond all question very profitably, receive some attention from our statesmen and divines.

Lainé, Dupin, Migné.

In France—a broad distinction being drawn between matters of faith and matters of discipline—Ecclesiastical appeals lie directly from the Bishop to the Metropolitan, and from the Metropolitan to the Pope. But the "*appel comme d'abus*," the "*appellatio tanquam ab abusu*" is a method by which the civil power in certain cases steps in and asserts its authority. By this means there is a final appeal under specified circumstances in causes Ecclesiastical to a State tribunal. The principle, however, which regulates the exercise of Civil supremacy in the "*appel comme d'abus*" is in strict conformity with the maxim that the Imperial power should assist in the due promulgation, and should oversee the just execution, of Ecclesiastical sentences, but should not take part in the examination of the dogmas of faith involved in any Spiritual cause. And this is in close accordance also with the principles of jurisprudence laid down by Van Espen and De Marca, before quoted.

Vid. sup. chap. II.

Vid. sup. chap. III.

The interference of the Civil Court in an "*appel comme d'abus*" is consequently limited to special cases (1) where, in assigning penalties, the Ecclesiastical Tribunals have exerted an excess of power; (2) where they have violated the laws of the kingdom or

the liberties and rights of the subject; (3) where they have committed outrage or violence in the exercise of Ecclesiastical authority. In such cases only, an appeal will lie to the Secular Court. But under this form of proceeding no right of interference has ever been claimed by the civil power in the determination of purely spiritual questions. The freedom of the Gallican Church from any secular interference in this respect was strenuously maintained by the doctors of the Sorbonne upon the principle that as National Churches could decide on questions of faith independently of the Pope, so they could *à fortiori* decide independently of the prince. And this principle has been fully admitted into the jurisprudence of France, by which the "*appel comme d'abus*" is distinctly limited to the cases above specified.

It should be here added that while the theory of French law admits the "*appel comme d'abus*," the proceeding, as a fact, is rarely, if ever resorted to. However, the principles on which it is grounded appear well worthy of consideration by our authorities in Church and State, and if properly applied here, might prevail to mend the abnormal and indefensible condition of our own legislation.

6. Ecclesiastical Appeals in Scotland.

In Scotland the final Court of Ecclesiastical Appeal is the "General Assembly."

The Courts of the Establishment in that country are four in number, and shall be viewed in an ascending order.

(I.) The "Kirk Session," the lowest Court, is held in each parish, and consists of the minister and elders of the parish. The minister is "President," or "Moderator," and in his absence no business can be transacted. The number of these "Kirk Sessions" is more than a thousand.

(II.) The "Presbytery" is the second Court. From the "Kirk Session" there is an appeal to the "Presbytery," a body consisting of the ministers of a number of neighbouring parishes, and of an equal number of lay elders, one elder being sent from each parochial Kirk Session. The number of parishes united in a "Presbytery" varies according to circumstances, from three in Shetland, to thirty or forty in Edinburgh or Glasgow. The Presbyteries are eighty-four.

(III.) The "Synod," or as it is more properly called, the "Provincial Synod," is the third Court. The "Provincial Synod" consists of one minister from every parish church, and of one elder from every Kirk Session within the Synodical boundary, together with certain corresponding members or delegates from neighbouring Synods. The extent of these Synodical boundaries varies according to circumstances, some Synods combining only three Presbyteries, others as many as eight. The number of Synods is sixteen.

(IV.) The "General Assembly" is the fourth and last tribunal,

being a Supreme Court of final appeal. It is composed of (1) two or more ministers from every Presbytery, (2) one or more elders, called ruling elders, from every Presbytery, (3) a representative of each of the four Universities, who may be either a minister or an elder, (4) a Commissioner, who must be an elder, from each of the seventy Royal Burghs; and (5) a Lord Commissioner delegated by the Crown. This is the Court of last resort. There is no appeal from its judgments to any tribunal whatsoever; not to Parliament, nor to the Crown. The effects of its sentences cannot be averted but by an action in the Supreme Civil Court, and this can be maintained in those cases only where civil wrong has been inflicted by the "General Assembly's" going beyond its jurisdiction, or otherwise violating the laws or constitution of the country. In fact the principles which govern the French "*appel comme d'abus*," prevail also in Scotland.

The power of the Lord Commissioner as representative of the Crown in the "General Assembly" is a moot point. In form, the "General Assembly" and the Crown each asserts supremacy, in fact, the Crown leaves "the Assembly" free to act as it pleases. The last conflict took place in the reign of King William III., when the Crown insisted on dissolving "the Assembly," and in fact did dissolve it, not allowing another to sit till it suited His Majesty's convenience. But though "the Assembly" was thus subject to constraint, it obeyed under protest, and it is by no means admitted by those well qualified to judge, that the authority of the Crown was not unjustly and unconstitutionally overstrained.

As regards the penalties inflicted under the authority of the "General Assembly," suspension of a minister for teaching doctrines repugnant to the "Confession of Faith"—the authorized standard—may be, and has been inflicted, but it is a comparatively rare punishment. Deposition is more common. However, in either event, whether of suspension or deposition, no relief from the penalty imposed can be obtained, except in a case of manifest excess of jurisdiction or violation of law, and then only by an action in the Civil Court; for there is no appeal on the merits, as before said, to any authority whatsoever, not even to Parliament, nor to the Crown, from the final sentences of the "General Assembly of Scotland."

Now here again, even within the limits of our own island, we find a course of appeal in spiritual causes existing which, by contrast, exhibits in a strong light the indefensible system to which the Church of England is subject. And, moreover, one gathers that there can be at least no constitutional bar against a course being pursued here analogous to that which prevails north of the Tweed and Sark. It is no part of my object to defend a Presbyterian form of Church government, nor the admission of laymen

into an assembly convened for deliberation on questions of doctrine; indeed, such defence more properly belongs to those who think that it may be maintained upon the principles of the Apostolical and Primitive Church. But it must be said, that admitting the "General Assembly of Scotland" to be the supreme legislative authority in matters of faith for the Scotch Kirk—as its members hold and affirm it to be—then nothing can be more consonant with religious duty, right reason, and the true principles of ecclesiastical and civil jurisprudence, than that that nation should have maintained the "Assembly" as the Court of Final Appeal in Causes Spiritual. Such a determination is worthy of all admiration, not only as asserting great religious principles, but as affirming those fundamental maxims of general law which have regulated final jurisdictions in past generations of men, when the science of legislation, to speak softly, was not less deeply studied, nor less clearly understood, than among us in this nineteenth century.

For the maxim, "*Cujus est condere ejus est interpretari,*" enforces a truth which, in these later days, has passed too much out of mind, though it may perchance assert itself in most unexpected quarters, and it may be at most inconvenient seasons. But however little regard may now be paid to it in modern legislation; however men may have habituated their minds to the notion of the supremacy of Courts, wholly forgetting that Courts are but the creations of a power above themselves; yet the maxim above mentioned has unmistakably set its mark on the jurisprudence of venerable antiquity. It is conspicuously illustrated here in our own country in the fact that all appeals from our Common Law Courts still lie ultimately in theory to the House of Lords, representing the great council of the nation, the source of all law, the "Magnum Concilium" as it existed previously to the separation of the Supreme Legislative Assembly into two houses.

Beyond all question the present practice which prevails, involving a delegacy of the Lords for hearing such cases, does not carry out the principle involved in its integrity. But the fact that common law appeals do arrive at the Upper House of the Legislature in last resort is a sure and abiding testimony that the principle now under view aforetime bore sway in this land, and is not as yet, at least in theory, wholly abandoned.

Indeed it is manifest that the adoption of any other principle is surrounded with difficulties, and attended with dangers, of which signal warnings have lately been supplied from the other side of the Atlantic. When the Supreme Court of the United States of America lately ventured to suggest doubts as to the constitutional character of some proceedings in Congress, a clamour at once arose for impeachment of the Judges. Courts, even though asserted and assumed to be final, are but the creations of a power

superior to themselves, and on the very first shock of collision between legislative and executive authority, it requires no prophet to foretell which will bite the dust.

And if in secular matters it is a right principle that the authority which makes law should in last resort be the interpreter of it (and it certainly will be so in extreme cases, whether the admission of the principle is palatable or not), how much more needful is the adoption of this principle in matters of spiritual contention! For in such cases the authoritative documents and formal embodiments of law are much more general in their expressions than civil enactments; formularies directed to restrain the inner eccentricities of the human mind are of necessity less precisely defined, and of wider application than instruments which are framed to govern the outward conduct of men.

From the foregoing considerations, the principle which has been adopted and maintained of committing final appeals in spiritual causes to no Court at all, by the Scotch Kirk, but to its highest legislative authority, appears unexceptionable. Such a system is not only worthy of imitation from the fact that it accords, at least in principle, with the primitive practice of the Church, as illustrated by the history of the early Christian Councils; but further, it commends itself to reason, as being in entire harmony with those fundamental principles of law which underlie the exercise of all executive jurisdictions. In contemplating the case of Scotland, the system of final appeal to which the Church of England has been subjected presents from every point of view a sad contrast, and in this respect at least the good example of our northern fellow-subjects seems to have been among ourselves wholly disregarded.

Digest, Tit. ii. Can. 1.

7. Ecclesiastical Jurisdiction in the United States of America.

In the Episcopal Church of the United States of America in communion with the Church of England there is no Ecclesiastical Appeal, the first judgment pronounced in a Spiritual Court being definitive. As no Ecclesiastical divisions into provinces have been there established, as judicial powers are not conferred on the General Convention, and as no Court of the nature of a central appellate tribunal has been ever there created, final jurisdiction over Priests and Deacons resides in each separate diocese.

It is not considered essential that the proceedings in the trial of a clergyman should be identical in all dioceses, each regulating its own mode of proceeding. The course, however, pursued in Massachusetts may serve as a specimen. Every diocese has a "Standing Committee," which is an executive body designed to assist the Bishop in the discharge of his secular duties. In Massachusetts this body performs functions analogous to those of a Grand Jury, and in case of a charge against a clergyman holds a preliminary investigation. If in the opinion of the Standing

Committee there is "*probable cause*," it makes a formal presentment to the Bishop, with regular specifications of the offence assigned. The Bishop then nominates nine Presbyters, of whom the accused may strike off four, and the remaning five constitute the Court. The Bishop himself does not attend the Session of the Court, nor take any part in its proceedings. Each side may be represented by counsel, either lay or clerical, and when the hearing is ended, the entire record, including all the evidence, the judgment of the Court, and the sentence it recommends, is transmitted to the Bishop, who may diminish, but cannot increase the severity of such sentence, or he may grant a new trial.

No diocese in the United States has established a second Court of Appeal from the first, consequently from no Ecclesiastical judgment on any point of law or of fact, whatever the punishment adjudged, is any Spiritual appeal allowed to a clergyman beyond the Bishop of each diocese and the Court which he organizes in the first instance.

Discipline, as exercised over Bishops, since no Provinces and consequently no Metropolitan Courts exist, belongs to the General Convention. The provisions, however, for this purpose vary in charges of Heresy, and in charges for other offences.

(1) In cases of Heresy the whole House of Bishops, except the accuser and the accused, is the Court, and a Bishop must present the offence. The presentment is addressed to "the Bishops of the Protestant Episcopal Church in the United States." Three-fourths of such Bishops constitute a quorum, and the consent of two-thirds of all the Prelates entitled to seats in the House of Bishops is necessary to a conviction. This principle that a Bishop should be judged by Bishops only is in strict conformity with the example of the Primitive Church. For down to the ninth century a Bishop could not be tried in a Court at all, nor by any other authority than by his brother Bishops, in Synod, whatever practice may have been introduced in more recent times.

Digest. Tit. ii. Can. 9. § 7.

Apost. Can. 73. Conc. Constant. i, Can. 6. Antioch Can. 3.

(2) In charges other than those of Heresy against a Bishop, the proceedings are as follow:—A board of clergy and laity chosen by lot, under the direction of the presiding Bishop of the Church, makes a preliminary investigation; and if the majority are of opinion that there are sufficient grounds to put the accused Bishop on his trial, they direct the Church Advocate to prepare a presentment. The presiding Bishop then directs the names of all "the Bishops of the Protestant Episcopal Church in the United States," with the exception of any who may be directly related to the accused, to be placed in a vessel, and eleven of them to be drawn. From the names drawn the accused and the Church Advocate may alternately strike off one till the number of persons is reduced to seven. These seven persons, or the majority of them, constitute the Court for trial. Their decision,

Van Esp. Jus. Eccl. p. 1, t. 20, c. 3, § 4, p. 3, t. 3, c. 6, § 3.

Digest. Tit. ii. Can. 9, § 5.

Ibid. § 5.

Ibid. § 6—12.

Ibid. Tit. i. Can. 11.

with the record including all the evidence, must be sent to the General Convention, and the entire House of Bishops, by a majority of the whole number entitled to seats, may remit or modify the sentence.

Thus it is to be observed that in the case of a Bishop, as of a Priest or Deacon, there is no regular appeal from the Court of first instance on questions of theology, law, or fact; the diocesan Bishop meanwhile having control over the severity of the sentences of the Court which tries a clergyman, the House of Bishops having control over the severity of the sentences of the Court which tries a Bishop.

It is also further to be observed, that the tribunals are composed, in all the three cases above detailed, exclusively of Ecclesiastics. No layman is a member of any of them, the first being composed of five Presbyters, the second of the House of Bishops, the third of seven Bishops. Indeed, so jealous is the Ecclesiastical system in the United States of America in this respect, that although it is provided that the Court of Bishops may be attended by "lay advisers" of the "profession of the law," yet questions "theological" are specifically excepted from those which may be subjected for their opinion. And even should there be a doubt whether a question is "theological" or not, it must be decided by a majority of votes of the Court that it is not so, before the opinion of the lay advisers can be invoked. This fact is commended as well worthy of consideration by those who defend the constitution of our Final Court of Appeal in Ecclesiastical Causes.

Sup. p. 45.

Digest. Tit. ii. Can. 9, § 6, (13).

Ibid.

As regards misdemeanours cognizable, and penalties inflicted by the Ecclesiastical tribunals above detailed, the Canons of the General Convention have provided that all the Clergy shall be amenable for offences which may be divided into three classes,—1. Heretical Teaching, 2. Immorality, 3. Irregularity. The punishments imposed are also of three degrees of severity,—1. Degradation, 2. Suspension, 3. Admonition.

Digest, Tit. ii. Can. 2.

Ibid. and Can. 37, 1832.

These Ecclesiastical tribunals have no authority from the law of the land, such civil authorization of course existing only where there is a connexion between Church and State. They cannot therefore obtain aid from the secular power, either for securing the attendance of witnesses on trial, or for directly enforcing sentences when pronounced. The only coercion they can use is such as voluntary societies can exercise under the Common Law, viz., —1. Exclusion perpetual, 2. Exclusion temporary, 3. Rebuke; punishments described in theological language by the terms above specified, 1. Degradation, 2. Suspension, 3. Admonition.

However, though there is no Spiritual Appeal Court in the "Protestant Episcopal Church in the United States," yet it is interesting to inquire how the decisions of Ecclesiastical tribunals

there are treated in cases when their judgments entail judicial proceedings before the Civil Courts.

The public law there looks upon Ecclesiastical Courts as tribunals established only by voluntary societies, and holds their authority to be merely such as the rules and usages of the society which establishes them confers. If a member of any voluntary society has suffered in reputation or property by its acts, in such sort as to entitle him to damages, he can bring his action in a Civil Court for compensation. His suit may be for violation of contract, for recovery of debt, or for a tort, i.e. loss in property or character. The proceedings may be taken against the whole body or against individual members of the society, but in any case, both plaintiff and defendant are alike held bound by the rules of the society to which they belong, so long as those rules do not contravene public law. All therefore that the Court has to do is to determine whether, according to such rules, the contract is violated, the debt due, or the tort unjustifiable.

The principles adopted in Ecclesiastical cases by the Civil Courts are precisely analogous to those which prevail in respect of Clubs and all other voluntary societies. For instance, if a member is dismissed by the decision of a tribunal within the society, he may bring his action at law because he loses an interest which has an appreciable value. The questions for the Civil Court are—(1) Had the tribunal jurisdiction over the case by the law of the society? (2) Did it, in exercising this jurisdiction, proceed according to that law? (3) Where there was no specific rule touching the case, did it proceed reasonably, fairly, and in good faith? If these points are decided in favour of the society as defendants, the Court will look no further. It will not re-examine the merits of the case itself; for the plaintiff, in joining the association, agreed to the jurisdiction which has given judgment. The law of the society, if not contrary to public law, is assumed to be the law for the case, and the only question is this, —Did its tribunal decide in accordance therewith?

So, if a Presbyter is degraded, or suspended, or admonished, he may bring his action at law for damages, for thereby he loses his parsonage or his income, or at least suffers in reputation. If the Ecclesiastical tribunal or the officer who sentenced him had not authority by the constitution of the Church, or inflicted a punishment not warranted by the law of the Church (and here unwritten law and established usages are included with written law), or acted in bad faith, they are liable, and can be compelled by legal process to reinstate the plaintiff if degraded or suspended, or to pay him damages for injured reputation if admonished. On the other hand, if the penalty inflicted should appear to have been in all respects warranted by the law of the Church, the secular Court will uphold it, the Court having satisfied itself

on the only point into which it will inquire, i. e. whether the proper tribunal proceeded regularly.

On the foregoing principles the Civil Courts in the United States sustain by their judgments the faith of each religious society as that society holds it, so it be not contrary to public law and decency. They do not inquire what is or what is not orthodoxy, but what does the society in question hold to be orthodoxy? Thus a Civil Court would uphold on the same day a Presbyterian tribunal in punishing a minister who enforced the necessity of Episcopal ordination, and an Episcopal tribunal in punishing a clergyman who denied the value of that ordinance; a Unitarian society in punishing a teacher who maintained the doctrine of the Trinity, and a Trinitarian society in punishing a preacher who opposed it.

Consequently, so long as the authorized tribunals of any religious society in the United States of America proceed fairly according to their own law, so it be not contrary to public law, the Civil Courts will sustain their decisions. And it is here worthy of observation, that this principle of dispensing equal justice by upholding the peculiar doctrines of each separate community is also adopted in this country with respect to all religious bodies whatsoever, except one. That solitary exception is remarkable, being none other than the Church of England.

CHAPTER VI.

FINAL COURT OF ECCLESIASTICAL APPEAL IN ENGLAND.

1. Duties of Chief Pastors of the Church.—2. Final Court.—3. Court of Delegates.—4. Judicial Committee of Privy Council.—5. Assessors appointed to attend the Sittings of the Court.—6. Incompetency of Court.—7. Principles of Proceedings inadequate.—8. Methods of Proceedings unsatisfactory (I), (II), (III).—9. The Solœcism of a Civil Court affecting Spiritual Jurisdiction.

1. Duties of Chief Pastors of the Church.

It will now be well to state the exact position of affairs in England as defined by imperial legislation on this subject. Primarily it is beyond question the office and duty of the Chief Pastors of the Church to ordain fit men to the ministry, to institute them to the cure of souls, and afterwards to superintend, and, if needs be, to correct them in the discharge of their spiritual functions. Indissolubly bound up with the last named duties is the responsibility of providing that pure doctrine shall be preached, false doctrine banished, and discipline maintained. For this end, among others, the Bishops' and Archbishops' Courts are not only ecclesiastically, but constitutionally and even statutably armed with large powers, enabling them to correct by suspension, and, in extreme cases, by deprivation of office. But after a Bishop has decided that a clergyman holds false doctrine, and after an Archbishop has confirmed that judgment, there is a final Court in England which, whatever be the legal theory, practically undertakes to correct both Bishop and Archbishop, and in fact to reverse the decisions of the Chief Pastors of the Church, in respect of those persons to whom the care of souls is to be committed in this country.

Eccl. Judgments, pp. 37, 356.

2. Final Court.

Now it is certainly of the gravest importance, if such high functions are in practice entrusted to any Court whatsoever, that it should be constructed with the most careful regard to the duties consigned to it, so that no great principles, historical, ecclesiastical, or constitutional, should be contravened by its existence or its action; and further that it should be constructed with the most careful regard to the character and qualifications of its members, so that it may be thoroughly fitted to wield the very large spiritual powers which it affects.

Parl.Pap.322, Sess. 1850. Eccl. Judgments,Introd. xlvi.

3. Court of Delegates.

From the reign of King Henry VIII. until the last few years, the Sovereign had statutable power, dating from the year 1534, to constitute a final Court from time to time *pro hâc vice* as occasion should require. The instances, however, of the exercise of this power, in cases of heresy or false doctrine, are extremely rare, not more than three, or at the most four, remaining on record. At any rate, as the constitution of the Court was entrusted wholly to the Sovereign's discretion, and the choice of the Delegates who should compose it was left at large, there was at least the possibility of a selection being made of those persons throughout the whole country who were by character and qualifications most fitted to rule the questions at issue. But by the legislation of the years 1832 and 1833 (a most serious blunder and legislative oversight occurring in the latter year), this power of general selection was statutably taken from the Sovereign, and the appellate jurisdiction was practically committed to a fixed Court, confined to a comparatively small body of persons defined by Act of Parliament, 3 and 4 Will. IV. 41, and denominated the Judicial Committee of Privy Council.

2 & 3 Will. IV. 92. 3 & 4 Will. IV. 41.

Sec. 1.

4.Jud.Com.of Privy Council.

That body is composed by the statute last mentioned of such members of Her Majesty's Privy Council as hold or have held certain offices, together with two other Privy Councillors appointed by royal sign manual. The body, of course, under such circumstances is variable in numbers. At the present time it consists of about thirty persons, who (with two exceptions at most) may be all Dissenters. But it never sits in its entirety. By statute three of its members form a quorum, though it is usual for a somewhat larger number, averaging five or six, to sit in each case. The practical effect of the changes made in 1832-3 is this, that whereas between the years 1534 and 1832 the Sovereign, by the Lord Chancellor, who must be a professed member of the Church, selected Delegates from all England, of course including ecclesiastics, at the present time, by the existing law, out of the body of persons above mentioned, a quorum to form a court is selected, no ecclesiastic being included by any possibility. This, then, is our exact position now, that the Archbishops and Bishops of England, in their spiritual superintendence and jurisdiction over the English Clergy and the doctrines taught by them, are practically subject to the control and correction of a quorum of the Judicial Committee selected in each controverted case *pro hâc vice* presumably by the Lord President. And we must remember that those who compose the quorum are by the present law necessarily all laymen, and possibly all dissenters from the Church's faith.

6 & 7 Vic. c. 38, sec. 1.

Though it was stated in a debate in the House of Lords, June 22, 1871, that the arrangement for the attendance of members was really made between themselves and Mr. Reeve the registrar of the Court.

5. Assessors appointed to attend the sittings of the Court.

The presence of any spiritual persons whatsoever at the sittings of the Court, when they have appeared there before the last statutable provision on the subject may have been accounted for by one or other of the two following reasons:—(1) By a statute passed in 1840, it was enacted that every Archbishop and Bishop of the United Church of England and Ireland, being a Privy Councillor, should be a "member" of the Judicial Committee for the purposes of that Act, but, it must be clearly understood, of that Act only, as this provision did not extend to general cases. (2) Or his presence may have been accounted for by this fact, that under a clause in the "Judicial Committee Act" itself power is given to summon any Privy Councillor not being a member of the Judicial Committee "to attend the meetings," not, be it observed, as a member of the Court, but "to attend the meetings" only. (3) Now, however, this system has been changed by the last Statute of 1876, under which it has been provided that Prelates should be admitted to the sittings of the Judicial Committee as assessors only. As such assessors, the Archbishops of Canterbury and York, and the Bishop of London, sit each for one year in succession, together with four Bishops appointed in a rota. The four junior Bishops sitting for a year, then the next four juniors, until the whole bench is exhausted, when the rota is repeated.

3 & 4 Will. IV. c. 41. 6 & 7 Vic. c. 38. 39 & 40 Vic. c. 59. 3 & 4 Vic. 86. Sec. 16. 3 & 4 Will. IV. 41. Sec. 5. 39 & 40 Vic. c. 59.

The exact position then is this that the Judicial Committee of Privy Council is a purely secular Court, owing its existence to Act of Parliament, but attended by spiritual persons as assessors to advise. But what weight may be haply given to this advice may be gathered from the proceedings in the cases of Williams v. Bishop of Salisbury, and Wilson v. Fendall, February, 1864, when it appears from the last words of the final judgment delivered, that the influence of the Archbishops of Canterbury and York, then summoned to assist the Court, was confined to the scant measure of a formal dissent from its conclusions. And if such be the amount of deference conceded by the Judicial Committee to our two Metropolitans, what influence may it be supposed that the assessors now appointed will exercise over its judgments?

If it should be admitted—and it can hardly be denied when the foregoing facts are duly considered—that the present Court of Final Appeal in Ecclesiastical Causes does ignore the distinction between civil and spiritual jurisdiction, such confusion unquestionably supplies considerable reason for dissatisfaction with this tribunal. But it is by no means to be understood that this is the only ground of complaint. There are others which shall

be specified as appearing very considerable to reasonable minds.

6. Incompetency of Court.

In the first place, though one is anxious to avoid giving needless offence in any quarter, yet in the cause of truth it must be said that the gravest doubts are very widely entertained as to the competency of this tribunal for a proper discharge of the functions it assumes. This Court is constructed by selection from a body of noblemen and gentlemen; some of them eminent as statesmen, some renowned for their knowledge of Chancery law, some for their experience in common law, and some for their acquaintance with Indian and colonial law. The highest attainments, however, in those various departments are no possible guarantee for a competency to pronounce judgment on theological questions. Yet one looks in vain for the name of one single divine among those from whom by the present law this Court is necessarily constituted.

And here it is to be observed that theological knowledge is no more than needful for the proper discharge of the functions which have been assigned—by misadventure, as shall be shown—to this tribunal. For its appellate jurisdiction is wholly different in nature and extent from that restraint which was before the establishment of this Court exercised over ecclesiastical judgments in England, and which has been time out of mind and is still exercised over them in other countries by civil process. Prohibitions in common law courts here, and proceedings under the *Appel comme d'abus* in France, distinctly illustrate the principle of restraint over ecclesiastical judgments which has long prevailed among the older civilized nations, and which has been adopted by younger ones into modern jurisprudence; as, for instance, by the United States of America. That principle is that Civil Courts should not try theological issues at all, but only deal with the civil accidents and temporal consequences of ecclesiastical judgments. For such functions as these theological knowlege is not necessarily required, and for the discharge of them the constitution of this tribunal might, perhaps, be unimpeachable. But the Judicial Committee of the Privy Council, in direct opposition to the practice of all received jurisprudence in civilized Christendom, whether in ancient or modern times, though a secular Court, tries theological issues and gives judgments on questions of purely spiritual cognizance. And though for such engagements theological knowledge is manifestly needful, yet not one single divine, as before said, is a member of that Court; nor is there the shadow of a guarantee that any one of those who constitute it should be versed in theological learning.

Now this can be no way satisfactory. Surely for a due discharge of the functions assumed by this Court, it should be familiar with Theology—a branch of special knowledge only to be acquired by long and laborious study. For instance: the Court

may be called on to decide questions involving those fine-drawn distinctions in matters of faith which have from the beginning been gendered in profusion by the subtle ingenuity of the Eastern mind, which are embodied in terms quite strange to mere students of classical and general literature, which are only handed down in language peculiar to theological science, and which, moreover, can only be fully comprehended by the perusal and mastery of records so voluminous as to daunt even persevering students. To have to pronounce final judgment in such matters might fairly make the boldest of men tremble with responsibility, even though his whole life had been devoted to their special study. So, to say the least, it argues considerable courage if any, perchance, should be found to undertake the execution of such an office without any previous fitting preparation at all.

7. Principles of Proceeding in the Court inadequate.

Not only do the reputed qualifications of this Court as regards competency to discharge properly the duties assigned to it fall short of satisfaction; the principles on which it proceeds are wholly inadequate to the exigency of the case. The Court has itself proclaimed that its functions are restrained to deciding whether or not the existing formularies of the Church of England have been breached, in fact, that all outside the written formularies lies outside the functions of the Court. But this is a restraint far too heavy, a limitation far too narrow, for the proper discharge of duties accruing to a Court of Final Appeal in Ecclesiastical Causes. There is a common law of the Church as well as a written law. If the former is disregarded, it is very doubtful at least (and, indeed, some people have no doubt about the matter at all), whether the Church's doctrine can be surely maintained; it is very certain that the Church's discipline cannot be duly administered.

To use on this subject the very cautious language of a learned judge of the Arches,—

"It is indeed a question of deep importance, whether or not there may be offences against the doctrine of the Church of England which cannot be included within the Articles and formularies."

And again, that learned judge says,—

"I think it true, that though nowhere distinctly expressed, the Articles were framed upon certain assumptions of fact and belief, in which it was taken for granted that all Christian men were agreed."

If such are the expressions of doubt uttered by a most cautious judge (and as before said, some people have no doubt at all on the matter) as regards the insecurity of the Church's doctrine under the protection of the formularies only, the question of the insecurity of her discipline under that ægis alone certainly admits

of no doubt whatsoever. Highly conducive to the well-being of the Church, nay, more, quite necessary for her existence as a witness and keeper of the Faith, there are many rules of ecclesiastical discipline which may be vainly sought for in the formularies of the Church of England. To mention, by way of instance, two cases only, the authority of a Metropolitan over his Suffragans, and the subordination of a single Bishop in matters of faith to a Provincial Synod, specially recognized by the Second Œcumenical Council, form a part of the common law of the Church Universal which can no way be safely dispensed with, as some late events in our own time have shown with sufficient clearness. Such common law of the Church, however, as experience teaches us, the Judicial Committee of the Privy Council wholly ignores, and, indeed, on occasion, appears to exult in dismissing with manifest contempt. The case is unsatisfactory enough when there is no guarantee that a Final Ecclesiastical Appeal Court should be furnished with theological learning: it is far more unsatisfactory when such a tribunal treats the principles and laws which underlie the very groundwork of its own duties with open scorn. And it is utterly impossible to foresee the disastrous consequences which will inevitably ensue if the Church's common law is in such a quarter not only ignored, but contemptuously scouted.

Conc. Constant. i., Can. 6.

Proceedings in reference to Dioc. of Natal.

8. Methods of Proceeding in the Court unsatisfactory.

Further grounds for dissatisfaction with this Court are supplied by the regulations which govern its practice, and by the methods of procedure which it adopts. They are not only eminently ill adapted for the proper discharge of its assumed functions, but are directly calculated to introduce complications and entanglements without limit, and to shake all confidence whatever in a tribunal which by its own acts unmistakably proclaims to the world that it has no confidence in itself.

(I.) For instance, it has always been held, from the earliest ages of the Church down to our own times, that in a case of accusation for false teaching it was sufficient to set out the words uttered or the passage written as the offence charged—the very words spoken or written being of course the offence complained of; nothing more, nothing less. And it is quite impossible that there can be more proper grounds, or indeed any other true and legitimate grounds, on which a tribunal can proceed to decide as to the orthodoxy of a statement or the contrary, than the very words of the statement itself, which is the matter of complaint. Indeed, until this Court undertook functions which appear wholly strange to its members and quite alien to their usual modes of thought, no one ever heard of anything beyond the words complained of being set out as the basis of a charge in the case of alleged false doctrine. It would be quite idle, and a very ill compliment to

any reader's competency in history, to go about to prove this by reference to acts of the Great Councils of Antiquity, or to recorded cases of the exercise of judicial authority by Ecclesiastical Courts in all ages of the Church. A late learned judge of the Arches, as indeed is the case with everybody who has any competent knowledge on such matters, had no doubt himself at all on this subject. Indeed, he expressed his own mind upon it with unmistakable clearness. He considered it to be the proper function of a Court wielding Ecclesiastical Jurisdiction, and having the words of the accused set out before it, in juxtaposition with the formularies said to be contradicted, to decide whether the latter had been contravened or not. And few people, one would think, will disagree with that learned judge, whatever the Judicial Committee of the Privy Council may have ruled in opposition to his view. Indeed it is very hard to believe that a single person of competent knowledge outside the precincts of Whitehall can come to any other conclusion than his.

Heath *v.* Burder, Eccl. Judgments, p. 214.

But this Court has laid down a novel and most surprising principle on this head, viz.—that it is insufficient to set out the words of the accused which are complained of; but that "a specification of the unsound doctrine or heresy" said to have been maintained must be supplied. Not to dwell now on the surprising novelty of such a requirement, or on this manifest confession that the Court doubts of its own competency for unaided investigation, or on the evident endeavour to shift its own responsibilities to the shoulders of other people, it is quite clear that such a method invites a ready entrance, and opens a boundless field, for the most mischievous exercise of legal ingenuity and subtle misrepresentations. And a Court which in such matters adopts this method will most assuredly find itself adjudicating upon anything rather than the plain issue before it. Instead of trying the "ipsissima verba" of the accused which is the offence charged, it will inevitably, on its own principles, vainly weary itself to distraction in trying the ingenuity of the advocates engaged, and in discovering the failure or success of pleaders in the forensic arts of distorting language and perverting intention.

Ibid. p. 222.

Consequently this method deliberately adopted by the Judicial Committee of the Privy Council, introducing a strange novelty into ecclesiastical proceedings, betraying an ill-concealed suspicion of its own competency by tacitly confessing a want of confidence in itself, and unreasonably seeking extraneous aid by casting on others responsibilities emphatically its own, cannot fail to engender such elements of mystification, and invite such opportunities for misrepresentation, as must tend infinitely to multiply the very difficulties which it thus vainly struggles to evade.

(II.) Another method of proceeding connected with this Court may be cited as a very serious ground of dissatisfaction.

Of the "articles of charge" filed in the lower Courts, those only which are retained by the judge there come before this tribunal. Those which are rejected there are eliminated from its cognizance on appeal.

Now in the case of a trial for heresy or false teaching this is very unsatisfactory. If a matter of this nature is taken piecemeal, the most deplorable miscarriages in justice are likely to ensue. In such a case the different parts of the teaching complained of may be so mutually dependent on each other, the relations of thought and the connexions of argument contained in different passages may be so closely intertwined, that a due consideration of the whole may be essential for arriving at a just judgment; otherwise the interests of defence, no less than of complaint may be imperilled; and therefore the whole charge, as originally made before the lower tribunal, ought to be submitted in the cases now under consideration to the Final Appeal Court. Doubtless in secular jurisprudence it may facilitate the administration of justice that a cause should be sifted in the lower Courts, and certain points only left for decision by the final tribunal. But this method when applied to the subject-matter of a spiritual trial, falls short of satisfaction. The whole charge, as originally made, and nothing less, should come before the final Court, and this in justice both to the accuser and the accused equally; for the points eliminated in the Court below may have most important bearings, either for conviction or acquittal, on the only matters left for the consideration of the final tribunal.

And further, suppose the judge of the lower Court to reject the right articles and retain the wrong ones, by no means an impossible contingency, indeed it is not certain that it has not been realized within recent memory, then the whole case, when it is most desirable for public reasons of the highest import that justice should be done, would fail, not upon the merits, but in consequence of this mode of procedure, which is ill-suited to the exigencies of the case.

(III.) There is another method of procedure connected with this Court which is a source of very grave dissatisfaction in the opinion of those best qualified to form a judgment in such matters. It is the practice for one member to deliver the judgment of the Court, all the rest being precluded from stating their individual views on the case before it.

Now this is not the practice in our other Courts of Justice, where each judge in turn delivers his opinion on the matters under consideration, whether that opinion coincides with the prevailing judgment or not. The method adopted in this Court is indeed founded on a hazy fiction, that its conclusions are not

judgments at all, but merely recommendations in the appeal to the Crown, which is supposed to give a final judgment in the case, and that such recommendations are the conclusion of the majority of the members. But whatever airy theories may float about the Chamber in Whitehall, this is in reality and in fact a final statutable Law Court, established by Act of Parliament in recent times, and the effects of its judgments follow as absolutely on its decisions as do those of any other constitutional tribunal whatsoever. Its method of proceeding should therefore, in all reason, as regards the point before us, be assimilated to theirs. And further, considering the subject-matter and the diverse qualifications and characters of the judges frequently here associated, it is eminently unsatisfactory that the several members should be precluded from delivering their individual opinions. It is by no means improbable, considering all the circumstances of this tribunal, that the conclusions of the minority whose opinions have been overridden, might, from the authority, character, and qualifications of those holding them, be entitled to the greater weight. Indeed, within very recent times an occasion occurred when such was the case.

Williams *v.* Bp. of Salisbury, Wilson *v.* Fendall, Eccl. Judgments, p. 290.

It is notorious that in legal estimation the weight and authority of precedents vary very considerably in proportion to the character of their authors; and in the case before us it is more than commonly desirable, when a precedent is laid down, that it should be distinctly known who is responsible for it, and what were the opinions of the most competent members of the Court. The whole Church of England, and those who are in Communion with her in other lands, are deeply interested in the final judgments of this Court, and it is beyond measure unsatisfactory that there should be any veil of secrecy whatsoever thrown around those persons on whom the grave responsibility of decision rests.

Doubtless complaints against this tribunal such as those three last mentioned, which arise out of its unsatisfactory methods of procedure only, are not of such grave import as those which lie against the principles on which the Court is constructed, both because such faults in practice might probably without much difficulty be remedied, and because they do not reach down to those constitutional disorders of the whole system which are hopelessly incurable. Still, however, these methods of procedure contribute to swell that ample measure of dissatisfaction which is very widely spread and very deeply felt.

9. The Solecism of a Civil Court affecting Spiritual Jurisdiction.

But there is still another ground of dissatisfaction with this tribunal, and that in a practical point of view, perhaps, graver than any of those which have been mentioned. It is this: that the existence and action of this Court involve a negation of all prece-

dents, ecclesiastical and constitutional, meanwhile entailing contradictions most glaring and complications quite inextricable; for though it is by the existing law a Civil Court, yet at the same time it affects spiritual jurisdiction, and undertakes to decide on theological issues.

Now this is a point which deserves to be considered with some care and particularity. It is by some people supposed that the nature and extent of authority which this secular tribunal exercises over spiritual jurisdiction is warranted by the examples of other civilized countries. But this is not so at all: our system is a solœcism. In foreign jurisprudence the Civil Courts will review ecclesiastical sentences so far as they touch civil rights, and so far only, for those Courts never affect, as in the case of the Judicial Committee of Privy Council, to try spiritual issues; they never pretend to settle theological disputes.

That a distinct understanding of what this Court, unlike secular Courts in all other civilized countries, undertakes to do, it is necessary to glance for a moment at the true nature and extent of spiritual authority. It may be said generally to regard, (1) The administration of rites and Sacraments, (2) the teaching of the Word, (3) the government of Christian society by adjudging censures of the Church, with concomitant penalties, against those who misbehave. While the action of this Court incidentally touches the two first-mentioned heads of spiritual authority, yet manifestly it is most directly concerned with the third and last. And this is directly exercised in a fourfold manner (1) by admonition, (2) by suspension, (3) by deposition, (4) by excommunication, with the concomitant disabilities and penalties attaching under each sentence.

Now, not to weary the reader by multiplying arguments, let us take an example which may serve for all under the first division of punishments involving the most lenient of ecclesiastical sentences, that of admonition. We shall thus be able to arrive at a sufficient appreciation of the strange principles which underlie the constitution of this Court, and of the absurd results which must of necessity flow from its action. Suppose a clergyman to have been admonished in respect of his doctrinal teaching by his Diocesan, and suppose this admonition to have been affirmed on appeal by his Metropolitan; the clergyman may then appeal from these sentences of admonition to the Judicial Committee of Privy Council. Thus, on a question purely spiritual, involving an issue purely theological, an appeal would be carried from authorities purely spiritual to a tribunal which is purely secular. And the contingency of an admonition for false teaching administered to a clergyman by a Bishop, ratified by an Archbishop, and then reversed by a body of laymen, may be commended to the

reader as supplying matter for grave consideration. Indeed, the very possibility of such an event, as before said, involves a solœcism in civilized jurisprudence, existing in no other country which has emerged from barbarism, except in England. And further: this solœcism here affects no other denomination of men, no other society except the Church. She is the sole victim of this Parliamentary accident, this legislative blunder, by which the Judicial Committee of Privy Council—a Court composed exclusively of laymen—is legally armed with power to reverse the admonitions in respect of doctrinal teaching addressed by Bishops and Archbishops to clergymen under their jurisdictions.

In any such case where that tribunal should avail itself of its legal authority, the incidence of costs would doubtless follow its judgment. But the moral weight which would reasonably attach to its decision may be duly estimated by any one who will take the trouble to remember that it is a Court of laymen only which assumes power to reverse the judgments of Archbishops and Bishops. In either case, were the matter not thought too serious for any hilarity, a smile would certainly be provoked by a consideration of the subject-matter of its judgments as contrasted with the composition of a tribunal—

"Cui placet impares
Formas atque animos sub juga aheneâ,
Sævo mittere cum joco."

Hor. Od. i. 33. 10—12.

For however wisely and well this Court may be constituted for hearing Admiralty, Colonial, and Indian appeals, the same cannot be said as regards its fitness for wielding the Ecclesiastical Jurisdiction unintentionally committed to it.

This subject might be pursued at length through the other grades of Ecclesiastical penalties rising from admonitions upwards. From a contemplation, however, of the lowest step, one may arrive, at least in this case, at a sufficient sense of the unwelcome character of the future ascent. But to whatever part of the system special attention may be directed, the following considerations can hardly fail to occur to any thoughtful mind. It is ill that the judgment of an ultimate Appeal Court in matters spiritual should in all cases lack the moral weight which should ever attach to final jurisdiction. It is much worse that its definitive sentences should in no case be secure from being wholly and absolutely ignored and repudiated in the conscientious forum.

This dilemma, in fine, is forced upon us by the constitution and action of this tribunal. If it is a secular Court, how, in contradiction to all civilized jurisprudence, both foreign and domestic, as hitherto received, can spiritual issues rightly be submitted to

its judgment? If, on the other hand, it is an Ecclesiastical Court, how can it be defensible that no single Ecclesiastic should be a member of it? To give a satisfactory answer to these queries, or either of them, would require ingenuity more than common.

CHAPTER VII.

HISTORICAL DETAILS TOUCHING FINAL ECCLESIASTICAL APPEALS IN ENGLAND.

1. Gradation of Ecclesiastical Appeals settled in Early Times.—2. Constitutions of Clarendon.—3. Archbishops' Courts final within the Realm.—4. Appeals to Rome.—5. The Great Statute of Appeals, 24 Henry VIII. 12.—6. First Establishment of Court of Delegates by 25 Henry VIII. 19.—7. Jurisdiction of Delegates transferred to Privy Council by 2 & 3 Will. IV. 92.—8. Jurisdiction transferred from Privy Council to Judicial Committee by 3 & 4 Will. IV. 41.—9. Summary.

1. Gradation of Ecclesiastical Appeals settled in early Times.

THE present condition of the law has grown out of sundry changes which have taken place from time to time; the chief change of all having been made by a mistake and oversight, as will be more particularly shown on arriving at that period of our enquiry when the change was made. So far back as the history of Ecclesiastical Courts in England can be traced, it appears that the gradation of appeals, with the exception of the final resort, has from earliest times been practically the same as that which exists at the present hour, for it is needless to consider now the fusion of the Arches' Court with the Provincial Court of Canterbury. Indeed, from the very constitution of the Church, and its fixed and unchanging rules of authority, this could hardly be otherwise. However, it will be unnecessary for our present purpose to travel backward in our research farther than the twelfth century, though on some matters connected with this subject I have in a preceding chapter gone back farther still.

2. Constitutions of Clarendon.

In the year 1164, by the Constitutions of Clarendon, the gradation of ecclesiastical appeals as handed down from former times, and as then existing, was accepted and ratified as part of the written law of England. By the 8th of those Constitutions it was enacted as follows :—

"Ab Archidiacono debebit procedi ad Episcopum, ab Episcopo ad Archiepiscopum, et si Archiepiscopus defuerit in justitiâ exhibendâ, ad Dominum regem perveniendum est postremò, cujus mandato *Controversia in Curiâ Archiepiscopi terminetur;* ita quòd non debeat ultrà procedi, absque assensu Domini Regis." Matt. Par. ad an. 1164. Conc. M. B. i. 435.

3. Archbishops' Courts final within the Realm.

By the above Constitution we see that, as now (the final resort excepted), the first step was from the Archdeacon to the Bishop; the second from the Bishop to the Archbishop; and thirdly, for lack of Coll. Eccl. Hist. ii. pp. 273, 274.

justice before the Archbishop, recourse might be had to the King, by whose orders *the controversy was to be finally decided in the Archbishop's Court;* and neither party might move for any further remedy without leave from the Crown, i.e. neither might appeal to Rome from the Archbishop's Court without royal permission. Now, whatever strange announcements on this subject may have been proclaimed by the learned Barons of the Exchequer, or whatever ingenious, and indeed odd, suggestions may have been made in a volume lately published, under very high authority, it is perfectly plain that under the terms of this 8th Constitution of Clarendon, though for lack of justice before the Archbishop recourse might be had to the King, yet that the controversy was still to be determined in the Archbishop's Court, and not elsewhere. The cause was not to be taken out of the hands of the Church; the judges were to be ecclesiastics, and the forms of proceeding governed by the methods of the Courts Christian.

Judgment, Court of Exchequer, July 8th, 1850.

Eccl. Judgments, Introduc. p. xxvii. note.

Coll. Eccl. Hist. ii. p. 276.

4. Appeals to Rome.

It is also observable, that in the last clause of the Constitution above quoted an appeal to Rome without the King's leave is forbidden. The ancient independence of the English Church on Rome, asserted on a notable occasion by Dunstan, and for nineteen years maintained by the last of our Saxon Archbishops, Stigand, was undoubtedly compromised by the influx of foreigners at the Norman Conquest. But the national unwillingness to permit appeals to Rome was continually manifesting itself notwithstanding. In the reign of King William II. the English Bishops and Barons declared to Anselm that "it was a thing unheard of for any one to go to Rome" (by way of appeal) "without the King's leave." In the reign of King Henry I. a formal complaint was made from Rome "that the King would suffer no appeals to be made" thither. And though Henry de Blois, Bishop of Winchester, did in the time of Stephen encourage appeals to Rome, yet we are assured by Huntingdon that this was a novel encroachment on national rights, and "by ill-example cruelly enforced." However, by this 8th Constitution of Clarendon it was distinctly laid down that no appeal should be carried to Rome without royal assent, and so it is no wonder that Pope Alexander III. should have busied himself in assaulting this article of our national jurisprudence. And though notwithstanding the above written law, and notwithstanding the Acts quoted on the margin, some of them known commonly as statutes of provisors and præmunire, appeals were made from time to time to Rome on account of a tendency among those in high places to wink at such proceedings, yet it is quite certain that such a course was opposed to the general mind and will of this nation.

Conc. M. B. i. pp. 247—8.

Thierry, Norm Conq. i. p. 144.

Conc. M. B. i. p. 315.

Inett Orig. Ang. p. 387.

Gib. Cod. p. 96.

Eadmer ap. Gib. Cod. 96.

L. 8, p. 395, apud. Gib. Cod. 96.

25 Ed. III. st. 5, c. 22.
25 Ed. III. st. 6.
27 Ed. III. c. 1.
38 Ed. III.
12 Rich. II. c. 15.
13 Rich. II. st. 2, c. 2.
13 Rich. II. st. 2, c. 3.
16 Rich. II c. 5.
2 Hen. IV. c. 3.
6 Hen. IV. c. 1.
7 Hen. IV. c. 8.

However, we learn from the Constitution above quoted—the formal declaration of English law at that time—that the final resort for all ecclesiastical causes whatsoever was within the realm to the Archbishops' Courts; and so the matter remained unchanged down to the year 1533. 9 Hen. IV. c. 8. 3 Hen. V. c. 4.

5. The Gt. Stat. of Appeals. 24 Hen. VIII. 12.

In the year 1533 two changes were made by the Great Statute of Appeals. 1. The Upper House of the Convocation of each province was substituted for the Archbishops' Courts for certain specified classes of causes in case the "matter or contention . . . . hath, doth, shall, or may touch the King, his heirs or successors." 2. The power of the Crown to permit an appeal to Rome from the Archbishops' Courts was annihilated as regarded the same classes of causes in an ordinary case. So that now the Archbishops' Courts, for all the causes specified by the Act,—an appeal to Rome being forbidden,—became absolutely final by statute; unless indeed they "touched the King," in which case, as above said, they would be referred to the Upper House of the Convocation of that province in which they arose. 24 Hen. VIII. 12. Sec. 9. Sec. 2.

6. First establishment of Court of Delegates by 25 Hen. VIII. 19.

In the year 1534 the final jurisdiction of the Upper Houses of the Convocations was extended, by statute, to all Ecclesiastical Causes whatsoever which "touched the King;" it being now enacted that— 25 Hen. VIII. 19.

"All manner of appeals of what nature or condition soever they be of, or what cause or matter soever they concern, shall be made and had . . . . after such manner, form, and condition as is limited for appeals to be had . . . by a statute . . . . (24 Hen. VIII. 12) . . . and according to the form and effect of the said statute, any usage, custom, prescription, or any thing or things to the contrary hereof notwithstanding." Sec. 3.

An appeal in all Ecclesiastical Causes whatsoever "not touching the King" was given from the Archbishops' Courts to the Crown, so that from that date the Archbishops' Courts ceased to be final resorts. The statute provided that—

"For lack of Justice at or in any the Courts of the Archbishops of this realm, or in any the King's dominions it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery, and that upon every such appeal a Commission shall be directed to such persons as shall be named by the King's Highness . . . . to hear and definitively determine such appeals . . . . which Commissioners . . . . shall have full power and authority to hear and definitively determine every such appeal . . . . and that such judgement and sentence as the Lord Commissioners shall make and decree . . shall be good and effectual and also definitive, and no further appeals to be had or made from the Lord Commissioners for the same." Sec. 4.

By this clause the High Court of Delegates for Causes Ecclesiastical "not touching the King" was introduced. The members of that Court being called Delegates on account of the special "delegation they receive from the Prince for the hearing and Gib. Cod. 1082.

determining every particular case." On this occasion the Archbishops' Courts first became Courts of inferior jurisdiction within the realm; and this strange novelty was introduced into our Jurisprudence, that their decisions should be subject to the correction of Commissioners appointed by the Crown. The power to appoint this Court of Delegates resided with the Crown for 298 years, i. e. from the year 1534 to 1832, when the next change took place.

7. Jurisdiction of Delegates transferred to Privy Council by 2 & 3 Will. IV. 92.

2 & 3 Will. IV. 92.

In the year 1832, in consequence of the reports of two Commissions, the Court of Delegates was abolished, and the jurisdiction previously exercised by that Court over the Archbishops' Courts was transferred by statute to the whole Privy Council. In theory, the jurisdiction previously exercised by the Crown in Chancery was conferred on the Crown in Council, thenceforward to be exercised by the Privy Council, subject to such rules, orders, and regulations as His Majesty by Order in Council should direct.

Sec. 3.

And so the whole Privy Council became the ultimate resort in all Causes Ecclesiastical which did not "touch the King."

8. Jurisdiction transferred from Privy Council to Jud. Com. by 3 & 4 Will. IV. 41.

3 & 4 Will. IV. 41.

In the following year, 1833, another change was made. The jurisdiction given in 1832 to the whole Privy Council was again transferred to a Committee of that body by statute, that Committee being composed of the following persons:—

Sec. 1.

"The President for the time being of His Majesty's Privy Council, the Lord High Chancellor of Great Britain for the time being, and such of the members of His Majesty's Privy Council as shall from time to time hold any of the offices following—that is to say, the office of Lord Keeper, or First Lord Commissioner of the Great Seal of Great Britain, Lord Chief Justice or Judge of the Court of King's Bench, Master of the Rolls, Vice-Chancellor of England, Lord Chief Justice or Judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, Judge of the Prerogative Court of the Lord Archbishop of Canterbury, Judge of the High Court of Admiralty, and Chief Judge of the Court in Bankruptcy, and also all persons members of His Majesty's Privy Council who shall have been President thereof or held the office of Lord Chancellor of Great Britain, or shall have held any of the offices hereinbefore mentioned." And it was also enacted, "that it shall be lawful for His Majesty from time to time, as and when he shall think fit, by his sign manual to appoint any two other persons, being Privy Councillors, to be members of the said Committee."

9. Summary.

The foregoing are the changes which have from time to time been made by statute in the matter of final Ecclesiastical Appeals. In the following Chapters some remarks will be made on the circumstances connected with each of those changes in chronological order. The reader meanwhile is requested to remember, that—1. In 1164 the usages previously existing were ratified. The Archbishops' Courts were declared final within the realm, and any appeal to Rome without Royal Assent was forbidden. 2. In 1533, first the Upper Houses

Const. Clar. Spel. Conc. ii. 63. Conc. M. B. i. 435. Matt. Par. ad an. 1164.

24 Hen. VIII. 12. 9.

of Convocation in each province were made the last appeal courts for certain specified causes, in case they touched the King; and, secondly, Royal permission to allow of an appeal to Rome for those specified causes in other cases was abolished, and so the Archbishops' Courts became for them absolutely the final resorts. 3. In 1534 the jurisdiction of the Upper Houses of the Convocations was extended from the certain causes specified by the Act of 1533, to all causes whatsoever in case they "touched the King." In case they did not, for all causes whatsoever an appeal from the Archbishops' Courts was given to the Crown in Chancery, whence was appointed in each case, *pro hâc vice*, a Court of Delegates to give definitive judgment. 4. In 1832 the Court of Delegates was abolished, and the appeals "not touching the King" which that Court had been empowered to receive were given to the Crown in Council, i. e. really to the whole Privy Council. 5. In 1833 the Judicial Committee of Privy Council was substituted instead of the Privy Council itself. 6. In 1840 by the Clergy Discipline Act such prelates as were members of Her Majesty's Privy Council were added to the Judicial Committee for the purposes of Appeals arising under that Act; but under that Act only. 7. In 1876, however, by the Judicature Act this last mentioned provision was repealed, and spiritual persons as assessors to the Judicial Committee were appointed to advise the tribunal in the rota above mentioned. Thus at this moment the Judicial Committee is a pure lay Court, having no spiritual person in any case as a member and is consequently devoid of all inherent spiritual authority whatever.

Sec. 2.
Ibid.
Sec. 6.
24 Hen. VIII. 12. 2.
25 Hen. VIII. 19. 3.
25 Hen. VIII. 19. 4.
2 & 3 Will. IV. 92. 1.
Ibid. sec. 3.
3 & 4 Will. IV. 41. 1.
3 & 4 Vict. 86, sec. 16.
39 & 40 Vict. 59.
Chap. vi.

CHAPTER VIII.

REMARKS ON THE CHANGE INTRODUCED BY 24 HENRY VIII. 12, A.D. 1533, N.S.

1. Upper Houses of Convocations Final Resorts.—2. Final Judgments of Convocations on Royal Marriages.—3. Endeavours to disable 24 Henry VIII. 12.—4. By a late Volume entitled "Ecclesiastical Judgments."—5. By Common Law Courts.—6. Court of Queen's Bench.—7. Court of Common Pleas.—8. Court of Exchequer.—9. Archbishops' Courts made absolutely final in certain causes.—10. Doubts suggested in a late volume entitled "Ecclesiastical Judgments" on this subject.

1. Upper Houses of Convocations Final Resorts.

As we have seen above, the Upper House of Convocation in each province was made in certain special causes "touching the King" a Court of final resort in 1533 by 24 Hen. VIII. 12. 9. This provision was confirmed and extended to all such causes in 1534 by 25 Hen. VIII. 19. 3. These two statutes having been subsequently repealed in Queen Mary's reign, were revived together, and conjointly in the next succession by 1 Eliz. 1, secs. 4, 6, 10; and as no alteration in this respect has ever since been made, it is tolerably clear that the matter now remains as settled in 1534. Indeed, every text writer of any consideration whatever has always so treated of it, and has spoken of the Upper Houses of the Convocations as final appeal courts in all "matters touching the King."

1 & 2 Ph. and Mary, c. 8.

2. Final Judgments of Convocations on Royal Marriages.

The truth is that this provision of the statute of 1533 was introduced with direct reference to the nullification then pending of the marriage of King Henry VIII. with Catharine of Arragon. The marriage, that princess having been widow of the King's elder brother, Prince Arthur, was without doubt by Ecclesiastical, and, as many believe, by Divine law, null "ab initio;" but having been contracted under a dispensation from Pope Julius II., it was esteemed desirable, if not necessary, that a formal nullification should take place in order to legalize any future progeny from another alliance. The interminable endeavours which were made to induce the Pope of that time to revoke his predecessor's act and disable the original dispensation, are matters of history. They were of course unsuccessful; for if Clement VII. had undone the act of Julius II. Roman infallibility would have reeled under the shock. So King Henry VIII. and this country were very properly led to look to the Provincial Synods of

England among other authorities for the expression of Ecclesiastical law on this subject; and consequently, on application being made for their opinion, the English Clergy decided in a manner quite worthy of them. In the Canterbury Convocation, together with other matter connected with the subject, it was decided by 263 votes to 19 on April 2, 1533, that it was unlawful to marry a deceased brother's wife, for that such a union was "prohibited by God's law, and above the Pope's dispensation." The same conclusion was come to in the York Convocation directly afterwards, on a division, by 51 votes to 2. And the formal instruments having been drawn in the Canterbury and York Convocations, under the direction of Dr. Tregonwell and Master Rolland Lee respectively, who appeared as Counsel on the King's behalf, the formal sentence of nullification was pronounced by Archbishop Cranmer, attended by sundry Bishops and "many great Clerks," on the 23rd of May following, in S. Peter's Church, Dunstable, in the diocese of Lincoln, and in the immediate neighbourhood of Catharine's residence at Ampthill.

Conc. M.B. iii. 756—8.

Conc. M.B. iii. 767.

Conc. M.B. iii. 757—8, 767—8.

Lord Herbert's Life Hen. VIII., p. 344.

Now, it is observable that this matter was finally settled with the King's legal representative, Master Rolland Lee, in the York Convocation, on May 13, 1533. For there seems to have been a desire to make the matter doubly sure by securing the formal authority of both our Provincial Synods. The statute 24 Hen. VIII. 12, giving final appeals to the Convocations in "matters touching the King," if we date its authority from the last day on which Parliament sat in that year, came into operation on April 7, and so it is pretty clear that its provision making the Upper Houses of the Convocations final resorts, was to forbid by statute any appeal from the Synodical decisions just about to be promulgated in a matter "touching the King" as nearly as can well be imagined.

Nor is there any good ground for asserting that this provision in the statute before us was annulled by the Act of the following year. For, notwithstanding the remarkable announcements to that effect delivered by the learned Justices of the Queen's Bench in that memorable essay in history with which they favoured the world on April 25, 1850; notwithstanding a similar judgment of the learned Justices of the Court of Common Pleas, delivered May 27, in the same year; and notwithstanding the assurance given us in a volume lately published under very high authority, that "*the provision relating to the King's causes never took effect;*" yet, it must be said that it seems to have taken not only speedy effect in the case of Catharine of Arragon, above recorded, but, moreover, to have exerted very lasting and permanent influences in after years over other cases "touching the King," and those of the very highest constitutional importance.

24 Hen. VIII. 12.

25 Hen. VIII. 19.

Eccl. Judgments, Introduc. xxxviii.

For a second instance of this provision relating to the "King's causes" taking effect, reference may be made to the sentence of divorce between King Henry VIII. and Anne Boleyn, which was introduced more than three years after the enactment of the statute under view, into the Convocation of Canterbury, and was there furnished with the necessary seals, and also with the signatures of the members.

Conc. M.B. iii. 803.

24 Hen. VIII. 12.

Conc. M.B. iii. 804.

For another instance of the provision relating to the "King's causes" taking effect, reference may be made to the nullification of the marriage between King Henry VIII. and Anne of Cleves, which took place more than seven years after the enactment of the statute before us. This cause, like the two before mentioned, very nearly "touching the King," was subjected to Convocational authority. And, indeed, the whole circumstances of the case afford a most imposing instance of a Synodical trial. To make assurance doubly sure, as in Catharine of Arragon's case, the authority of both the Canterbury and York Convocations was invoked, a large number of the Northern Synod appearing in London. Archbishop Cranmer detailed the object of the meeting; Gardiner, Bishop of Winchester, opened the case for the King. A Committee, consisting of the two Archbishops, Cranmer and Lee, the Bishops of London, Durham, Winchester, and Worcester, with some others, were appointed to examine witnesses and to receive evidence. This Committee selected a Sub-delegation of five persons out of their body to impose oaths on the witnesses, and reduce their evidence to writing. This cause "touching the King," moreover, loses none of its significance when we consider the high figure of the witnesses who appeared before the Court of Sub-delegation. Among the witnesses examined were—Lord Chancellor Audley, the Dukes of Norfolk and Suffolk, Lord Southampton, Lord High Admiral Russell, Lord Cobham, Sir Anthony Browne, Sir Thomas Heneage, Sir Anthony Denny, and others of inferior degree. Among the evidence put in was a deposition of King Henry VIII. himself. Eventually the Synod decided, after mature investigation of the evidence produced and of the merits of the case, that the royal marriage was null, on the ground, I believe, of pre-contract, and that both parties were at liberty by the Divine law to engage in a fresh nuptial alliance. The instrument, sealed with the seals of the Archbishops of Canterbury and York, and subscribed by other members of the Synod, bears date July 9, 1540.

Conc. M.B. iii. 851.

Ibid.

Ibid.

Ibid.

Conc. M.B. iii. 852.

Ibid.

Coll. v. 64.

Conc. M.B. iii. 854.

To these historical proofs that in cases "touching the King," the clause in 24 Hen. VIII. 12 took effect in after years, it is no answer to aver that these royal causes were heard by the Convocations respectively in the first instance and not on appeal. For in ecclesiastical causes it has been a common usage to go to the higher Court at once, "*prima vice*," as is testified to this day by

the practice of sending cases by letters of request from the diocesan consistories to be tried in the first instance in the Provincial Appeal Court. Nor, in the second place, does it disable these historical proofs to affirm that while the statute gave the jurisdiction in question to the Upper Houses of the Convocations, yet that members of the Lower Houses are found to have joined in the investigations and proceedings. In theory, the Upper and Lower Houses of a Convocation are ecclesiastically one Synod, and this is specially the case in discharging judicial functions. So far as our records remain, and there is abundance of them on this subject, I believe it can be shown that previously to the Reformation the two Houses invariably sat together in trials for heresy and false teaching, and specially in pronouncing judgment; and so it is more than likely that the Upper Houses in exercising their new statutable jurisdiction in "matters touching the King" did not choose so far to disregard all previous Synodical practice as to exclude the lower clergy from joining as of old in the final proceedings.

Hody. Hist. of Eng. Councils and Convocations, Part III. p. 247.

3. Endeavours to disable 24 Hen. VIII. 12.

I have been, perhaps, over particular in pressing this matter on the reader's attention. My excuse must be found in the pertinacious endeavours which have been made to disable this statute by asserting that from the date of its enactment its most remarkable provision "never took effect," and by suggesting doubts as to whether its other important provisions would have been permitted to prevail while the Act remained in its integrity.

Vide supra.

Eccl. Judg. Introduction, xxxviii.

4. By a late volume entitled "Eccl. Judgments."

Indeed, in a volume lately published under very high authority, it is affirmed by way of disabling the appellate jurisdiction of the Convocations in "King's causes" as follows:—"In the matter of the divorce, Queen Catharine did not appeal, having refused to acknowledge the authority of the Archbishop's Court." But the ecclesiastical, legal, official, and literary contributors to that volume failed to inform their readers that the divorce had been discussed, adjudged, and that the instruments legalizing it had been formally signed and sealed by both Convocations before Archbishop Cranmer pronounced the sentence. How, therefore, an appeal could have lain from those tribunals back to themselves after they had, under the new statute, already adjudged the matter, or how an appeal could have been prosecuted from the Archbishop's Court, which was not responsible for the judgment, is not explained. And this difficulty appears the more incapable of solution when one remembers that the Convocational decision in such matters was under the terms of the statute, "Never after to come in question and debate, to be examined in any other court or courts."

24 Hen. VIII. 12, 9.

5. By Common Law Courts.

It is matter of notoriety that both history and law have experienced rough treatment in our common law courts. The jurisdiction of the Convocations in causes "touching the King" came under discussion in the Courts of Queen's Bench, Common Pleas, and Exchequer in the year 1850. The argument arose in each on three several applications for a prohibition to prevent the Archbishop of Canterbury from instituting a clerk to a benefice in the diocese of Exeter, "or otherwise carrying into execution an order of Her Majesty in Council of March 9, 1850."

Gorham *v.* Bp. of Exeter.

Eccl. Judgments, 107.

6. Court of Queen's Bench.

Judgment, Ap. 25, 1850.

The Court of Queen's Bench then held that the Convocational jurisdiction over the "King's causes" given by the statute of 1533, was taken away by a statute of the following year, 1534. This, however, seems a remarkably odd conclusion, considering that the Act of 1534 specially and unequivocally in terms confirms in its 3rd section "the manner, form, and condition" of all manner of appeals as settled in 1533; except, of course, so far as any alteration was specifically made by the second statute. But no alteration whatever was even hinted at, much less made, as regards the "King's causes." However, as the decision of the Queen's Bench was illustrated by fictions and based on grounds which flatly contradicted the acknowledged facts of history, it gave no satisfaction. For instance, the Court decided that King Henry VIII. was "*impatient to marry Anne Boleyn*" at the time when the issue of that union, the Princess Elizabeth, was five months old; the Court thus boldly and unequivocally affirming the Crown of England to have been illegitimate in the person of our renowned Queen in the third succession, the notable Elizabeth. The Court further decided that "*Sir Thomas More, a rigid Roman Catholic, was Lord Chancellor*" when 24 Henry VIII. 12 was passed; i.e., between February 4 and April 7, 1533. This again is altogether wide of matter of fact, for that learned person surrendered the seals on May 16, 1532. Once again the Court held that Audley succeeded to the Chancellorship between April, 1533, and Jan. 1534. This is equally untrue, for that pliant courtier attained to the dignity of Lord Keeper on May 20, 1532, and to that of Lord Chancellor January 6, 1533. And so, as the Court of Queen's Bench missed its way so irrecoverably among the acknowledged landmarks of history, and was in truth so unfortunate as to trample down facts and dates into a hopeless mass of inextricable confusion, it is not surprising that a judgment founded on such performances has hitherto found no credit whatsoever. Nor has it been usual for any body to refer to it with any satisfaction as a true exponent either of fact, history or law.

24 Hen. VIII. 12.

25 Hen. VIII. 19.

Ibid.

Eccl. Judgments, p. 110.

Ibid. 109.

Cott. MSS., Tit. B. 1.

7. Court of Common Pleas.

The Court of Common Pleas came to the same conclusion as the Court of Queen's Bench—that the Upper Houses of the Convocations were not final appeal courts in matters "touching the King;" but, of course, not in consequence of the same methods of reasoning, nor by a like onslaught upon history. The deserved ridicule which had been cast on the previous judgment of the Court of Queen's Bench, the witty sallies of a learned advocate in the case, and the hilarity among the audience which greeted his exposures of the marvellous fictions affirmed as true by the Court of Queen's Bench, served as a signal warning to the learned justices of the Common Pleas to avoid with extremest caution the historical track of their predecessors. So the main endeavours of this Court were directed towards disabling the testimony of all the eminent text writers on this subject, who, it seems, without one solitary exception, have held that the Upper Houses of the Convocations are courts of final appeal in "matters touching the King." In truth one may say that the contest resulted in a general engagement between the Court of Common Pleas and the text writers.

Judgment, May 27, 1850.

Vide Speech, Sir F. Kelly,

Ct. C. P., May 2, 1850.

Court Ex. July 1, 1850.

However, it was thought necessary by the Court to make some preliminary demonstrations before assaulting so formidable a phalanx. The Court therefore approached its enterprise by throwing in a few somewhat unintelligible distinctions regarding the words *manner, form*, and *condition*, by way of disabling some very intelligible words in the two statutes before it, at the same time confessing, with what some people may think very needless modesty, that the interpretation adopted did perhaps "not exhaust" the whole meaning of the words. Then the Court cited a list of cases which, as was asserted, had been tried in the Court of Delegates. But of these the most considerable, and indeed those on which the Court dwelt at far the greatest length, and meanwhile under the gravest misapprehensions, were not tried in the Court of Delegates at all, but by a totally different tribunal —the Court of Review—upon which I shall have occasion hereafter to remark. Having thus opened the attack, the Court proceeded to assault the most eminent text writers in detail, who have, in combined array, declared the Upper Houses of the Convocations to be final appeal courts in "matters touching the King." And this was done with remarkable eagerness, and as some have thought with a violence more headstrong than commendable. It was no doubt clear to the Court of Common Pleas, as indeed to every one else, that unless the text writers could be silenced there was not the remotest chance of carrying the coveted position: viz. that the Upper Houses of the Convocations were not final appeal courts in "matters touching the King." And so upon the text writers, one by one, the attack was directed with the liveliest vigour and the most unwearied pertinacity.

Ibid. 24 Hen. VIII. 12. 25 Hen. VIII. 19.

First, the Court fell upon Coke armed with his 4th Institute, emblazoned with this device (24 Henry. VIII. 12. 1 Eliz. 1), a most ominous combination, and remarkably conspicuous from the omission of an intervening statute, which was throughout this whole engagement relied on as having annihilated the one first cited. Coke, however, holding a position peculiarly threatening to the justices of the Common Pleas, and resting moreover on Lord Dyer's manifest supports, had these two mottoes legibly inscribed under the device above mentioned:—"If any cause shall depend in contention in any Ecclesiastical Court which may or shall touch the King, his heirs or successors, the party grieved shall or may appeal to the Upper House of Convocation, within fifteen days after sentence given;" and again, "Where the matter toucheth the King, the appeal, within fifteen days, to be made to the higher Convocation House, and no further, but finally to be there determined." This renowned jurist received very barbarous treatment at the hands of the Court of Common Pleas, as must be confessed by everybody except his opponents. No fair regard was paid to the approved rules of legal warfare, and so Coke was most unhandsomely despatched.

25 Hen. VIII. 19.

24 Hen. VIII. 12.

Coke Inst. 4. 74, p. 323.

Ibid. p. 339.

See Judgment Ct. Exchcq., July 8, 1850, inf. sec. 8.

Next appeared Bacon, who opposed a very bold front. He maintains, "If the matter concerns the King the appeal must be to the higher House of Convocation." His real weakness, however, seems to have been that he relied too implicitly on the aids of Dyer and Coke, and so Bacon was somewhat cavalierly disposed of.

Abridgment, Tit. Ecclesiastical Courts, Letter B.

Then Comyn was engaged. He indeed affirms, on two different occasions, "In causes ecclesiastical if the King be concerned there shall be an appeal to the Upper House of Convocation;" and again, "If the King be concerned the appeal shall be to the Upper House of Convocation." This Chief Baron was maimed partly by the former charge of relying too confidently on Dyer and Coke; but, farther, he had what must be called rather an unfair advantage taken of him, and so he was, as one may say, struck down from behind.

Digest Tit. Convocation, D.

Ibid. Tit. Appeal. D.

Then Woodeson's positions were assailed. He says, "If indeed the cause affect the King an appeal may by the statute (24 Hen. VIII. 12) be brought to the Upper House of Convocation." And he further proceeds to affirm, "This provision does not seem abrogated by the subsequent statute (25 Hen. VIII. 19), by which appeals are to be made from the Archiepiscopal Courts to the King in Chancery." So as this lecturer was very defiant in his challenges, a remarkably lively volley was poured on him in these words: "The authority of this passage referring only to the 4th Institute before observed cannot be deemed entitled to any weight." And thus Woodeson fell.

Lectures, vol. i. 76.

Judgment, Court C. P., May 27, 1850. Ecclesiastical Law, Tit. Appeal, vol. i. p. 57.

Then there was some clashing with Burn. But as he only set out the law as detailed on the statute book and referred to by

Coke, the law and Coke having been previously disabled, this ecclesiastical jurist's engagement was a slight affair, and his overthrow was of course inevitable.

Then appeared Blackstone on the field. He threatened a remarkably stout resistance, for directly under the quotation of the statute 25 Henry VIII. 19 these words were somewhat ostentatiously displayed on his front: "But in case the King himself be party in any of these suits the appeal does not then lie to him in Chancery, which would be absurd, but by the statute (24 Henry VIII. 12) to all the Bishops of the realm assembled in the Upper House of Convocation." This was a serious check; and so batteries from various quarters were played off upon Blackstone. First, an attempt was made to disable what he did say by references to what he did not say on other occasions. Secondly, a charge was made which I must respectfully take leave to say involved what is substantially quite untrue in matter of fact. And thirdly, there was an endeavour to take a very unfair advantage of him, and to weaken his defences by introducing a somewhat doubtful statement of one of his modern editors, referring to matters which had occurred since our champion's death. But the Court meanwhile entirely omitted to refer to the notes of another editor, who emphatically and in terms affirms, and indeed illustrates, the position maintained by the learned commentator on the laws of England. At any rate, though it is difficult to say exactly how, Blackstone was silenced.

Comm. vol. iii. pp. 66, 67.

Stephens, vol. iii. 433.

Hovenden, vol. iii. 67.

The last stand, and that was a forlorn hope, was made by Ayliffe. His "Parergon" was the remaining outwork. His words are, "And if the cause or suit concerns the King, the party grieved may within fifteen days appeal to the prelates assembled by the King's writ in Convocation then next in being or ensuing in the Province where the suit was begun, and there it shall be finally determined." He was finally ridden down by a charge of inaccuracy in his mention of the statute in question. But it must be said, that upon a comparison of Ayliffe's words with the terms of the statute, the charge of inaccuracy fairly seems to lie the other way.

Parergon, p. 84.

24 Hen. VIII. 12.

Thus were the text writers disposed of in detail. But as we find the authority of Coke, Bacon, Comyn, Woodeson, Burn, Blackstone, and Ayliffe in one balance, while that of C. J. Wilde and Justices Maule, Creswell, and Talfourd has to be weighed in the other, it must be left to the consideration of the reader which side of the scales, so far as authority is concerned, is likely in the estimation of posterity to kick the beam.

The extraordinary historical and constitutional misapprehensions under which the last-named four learned justices laboured while preparing their judgment must not be passed over in silence,

because upon those misapprehensions the conclusions of the Court were mainly grounded, and because such serious errors do not tend to recommend its authority in preference to that of the text writers.

1. The first error is one into which the authors of the recent volume, published under very high episcopal authority, also fell when they asserted, as before remarked, that "the provision relating to the King's causes never took effect." Whether this assertion was copied from the judgment before us, or from that of the Queen's Bench, or is an original item of information, does not appear. If it was copied, it would have been safer to have relied on surer guides. However, to return to the consideration exclusively of the judgment of the learned justices of the Common Pleas.

Eccl. Judgments, &c., Introduc. xxxviii. Ibid. p. 112.

The Court affirmed that "after due inquiry and investigation no instance has been discovered of an appeal in such cases to the Convocation;" and again repeating that "no appeal has been discovered to have been made to the Convocation," it grounded, in the antepenultimate sentence of its judgment, its "decision simply on the construction of these particular ancient statutes, as supported by the usage in the only instances of appeals in matters touching the Crown known to have occurred since they passed." Now as it is barely credible that in this "due inquiry and investigation" instances so important and so nearly "touching the King" as Royal matrimonial suits could have been overlooked, one must conclude that these learned justices followed the Queen's Bench example, and confusing their historical dates (not to speak now of the nullification of Catharine of Arragon's marriage in 1533), must have concluded that the divorce of Anne Boleyn and the nullification of the marriage of Anne of Cleves were anterior to the enactment of the statutes in question. But as the statutes were enacted in 1533 and 1534 respectively, as the divorce of Anne Boleyn was ratified by the Canterbury Convocation in 1536, and as the nullification of the marriage of Anne of Cleves was decided by the same authority in 1540, it is unquestionably clear that these most important cases in matters "touching the King" occurred after the statutes under view were passed, and not before. Nor will it at all serve the purpose of the learned justices in support of their history to ride off upon the averment that these causes were not brought before the Convocations on appeal but in first instance. Such causes might be carried at once by ecclesiastical usage and practice, which is the usage and practice we have here to do with, to the highest Court. And so this frail vehicle of escape breaks down under the weight of true history. The learned justices indeed endeavoured to disable the written law by the asserted lack of precedent, a very questionable proceeding, but the lack of precedent was altogether

Gorham *v* Bp. Exeter, Judgment, C. P. May 27, 1850. Ibid. Ibid.

Conc. M. B. iii. 804. Ibid. iii. 851—854.

misreported, and that made the proceeding more questionable still. Thus stand the historical errors.

2. The other serious misapprehensions under which these learned Justices of the Common Pleas laboured were constitutional ones; and as this matter lay strictly and unequivocally within the circle of their own professional reading, they were perhaps the less pardonable. These judges mistook one court for another, as was above remarked. The "High Court of Delegates" was substituted both in their minds and in the express terms of their judgment for the "Court of Review." Now, it would be difficult to name in the whole range of English judicature any two Courts which date their origin from principles more diametrically opposite. The first owes its birth to a specific clause of a specific statute; the second sprang from an entirely different source. It boasts a somewhat shadowy parentage, and was established on the foundations of some old Papal claims supposed to be transmitted to the Crown of England. But not only were these two Courts established on totally different foundations, the jealousies, and indeed open collisions, occurring between them are very notorious in the history of legal warfare. Such clashing took place in the reigns both of Queen Elizabeth and also of Charles I., and the arguments by which the authority of the "Court of Review" over the "Court of Delegates" was then upheld, and indeed finally established, are so surprising that it is hardly possible but that the nerves of any sensitive constitutional reader, upon bare perusal, would have received such a shock as would be extremely difficult to recover from afterwards. Certainly, unless the memory of any man, however insensitive, was very treacherous, those arguments could hardly fail, if he had once seen them, to leave such an impression on his mind as would forbid him thenceforth at any time from confounding together the "High Court of Delegates" and the "Court of Review." This catastrophe, however, manifestly befell the learned justices of the Court of Common Pleas, and, as it appears, influenced their judgment.

See application to C. of Exchequer, July 1, 1850.
Coke, Inst. 4. 341.
Oughton, Ord. Jud. i. 437.
Gib. Cod. 1083.
Burn, Eccl. Law, i. 56.
25 Hen. VIII. 19. 4.
Queen's Bench 39 Eliz.
Dyer, 273.
Littl, 232.
Coke, 4, Inst. 341.
Gib.Cod.1083.

To sum up this matter as it emerged from the Courts of Queen's Bench and Common Pleas. "If," in the words of a very learned lawyer, referring to the text writers above quoted, "the judgments of these Courts are right, then this long, unbroken chain of authority is entirely wrong." And further, if the Court of Queen's Bench was justified in deciding that the clause in the Act of 1533, constituting the Upper Houses of Convocation final appeal courts in "matters touching the King," was repealed by the Act of 1534; if the Court of Common Pleas was justified in coming to the same conclusion, by what conceivable ingenuity, can the facts be accounted for that Queen Catharine in 1533, Queen Anne Boleyn in 1536 were divorced, and that Anne

Sir F. Kelly, Ct. Exchequer, July 1, 1850.
Eccl. Judgments, p. 111.
24 Hen. VIII. 12. 9.
25 Hen. VIII. 19. 4.
Gorham *v.* Bp. Exeter, Judgment, May 27, 1850.
Conc. M. B. iii. 803, 804.
Conc. M. B. iii. 851—4.

of Cleve's marriage was declared null and void in 1540, by Con-
24 Hen. VIII. 12. vocational authority? The jurisdiction thus exercised was clearly founded on the 9th section of the Great Statute of Appeals of 1533, thus remaining unrepealed in 1536 and 1540, and consequently unrepealed to this hour: for no one has ever even suggested that matters do not stand at this moment as they did at the last-named dates. Indeed, if these causes "touching the
24 Hen. VIII. 12. King" did not come before the Convocations by virtue of the statute of 1533, it is impossible to conceive any reasonable supposition whatsoever which can account for those most important cases having been submitted to the tribunals which gave final decision upon them.

It is observable that the Courts of Queen's Bench and Common Pleas, when the question under view was raised before them, both refused to grant rules *nisi*, by which the advantages of further argument and fuller information—and these, to say the least, seem to have been no more than necessary—would have been secured. Those Courts appeared unwilling to allow any further argument in a case which it must be confessed placed these remarkably disagreeable alternatives, as they supposed, before them; though, indeed, the learned Barons of the Exchequer, as we shall see, afterwards avoided both horns of the apparent dilemma. On the one hand it probably appeared a very serious matter to grant a prohibition to inhibit the Archbishop of Canterbury, acting under circumstances then existing, from instituting a clerk in the diocese of an unwilling suffragan. On the other hand it was, without any doubt, a very serious matter to put on our great constitutional statutes a construction which contradicted the received rules of legal interpretation, and disabled the authority of an unbroken chain of the most eminent text writers on the subject under litigation.

As regards the first alternative, no one who has attained to the least smattering of legal history would venture even to surmise that it could be any way generally disturbing to a Common Law Court to grant a prohibition against an archbishop or against ecclesiastical jurisdiction. For the Common Law Courts have been often over-forward in this direction; and it would not be difficult to point out an occasion on which they received a severe
Strype's Ann. iv. 398. Royal rebuff for their readiness. Indeed, the judges of the Queen's Bench and Common Pleas, together with the Barons of the Exchequer, have before now had to deliver their answers to
Coll. iii. 12—40; vii. 314. Conc. M. B. iv. 417. the Lords of the Privy Council on complaints exhibited against them for such proceedings. And though Sir E. Coke would have those answers to be "the highest authority in law," yet other
Inst. ii. fol. 601. people will remember that the authors of them were for the time removed from the bench to plead at the bar; or rather, perhaps, that their size shrank down to the stature of defendants in the

suit. They were charged with overstraining their authority to the prejudice of others. So it was not their judgment that was sought, but a justification of their practice that was required before a superior authority to their own, as they themselves acknowledged by their answers. That "no man should be judge in his own cause"—"iniquum est aliquem suæ rei esse judicem"—is a maxim which has exerted a sensible effect on our jurisprudence, and one, indeed, which Sir E. Coke has himself cited when interpretation and not conquest was his aim. And as it has never been supposed that the studies of the learned profession would prevail to emancipate its members from such frailties as are common to mankind, specific statutes have been made to relieve our judges as far as may be from all temptation in this respect. So when the Common Law judges had to put in their answers to the complaints against them, which ran in the name of the whole clergy, and were framed on the statute "Articuli Cleri," those answers must be looked upon not as judgments from the bench, but as pleas in the defence, not as Sir E. Coke would have them, the "highest authority in the law," but rather as rejoinders in the suit. Delivering themselves in favour of their own privilege and jurisdiction, they were clearly interested parties in the case, and so Sir E. Coke's description swelled their pleas or rejoinders to a romantic bulk.

Coll. iii. 41.

Rep. viii. fol. 117.

8 Rich. II.c.2.

13 Hen. IV. c. 2.

33 Hen. VIII. c. 24.

Conc. M. B., iv. 417.

9 Ed. II: Inst. ii. fol. 601.

Coll. iii. 12—40.

However, to return to the first alternative which, as they themselves thought, was placed before the Courts of Queen's Bench and Common Pleas on the occasion we have been considering; one does not mean to suggest that it would have appeared under ordinary circumstances a serious matter at all to a Common Law Court to have granted a prohibition against the Archbishop of Canterbury or the proceedings of his provincial tribunal; only in this case his Grace was about to act under the authority of a judgment of the Judicial Committee of Privy Council, or, to speak technically, of "the decision of Her Majesty in an appeal." And to inhibit him under those circumstances probably appeared a very serious matter indeed. For the Judicial Committee, though comparatively a brand-new Court, not yet fifty years old, for some reason or other seems to be looked upon with solemn and almost mysterious reverence in many quarters, and to be an object of far more devoted regard than our ancient established ecclesiastical judicatures.

Eccl. Judgments, &c. Introduc. lxxvi. and pp. 105—7.

Eccl. Judgments, *passim.*

As regards the second alternative above referred to: viz. an abandonment of the received rules of legal interpretation, and a contradiction of an unbroken chain of the most eminent text writers; that, it seems, did not appear to the Justices of the Queen's Bench and Common Pleas so serious a matter as many other people have thought it and still think it. And so those Courts adopted this second alternative, and decided that the

Upper Houses of Convocation were not final appeal Courts in "matters touching the King."

8. Court of Exchequer.

The above decisions gave very little satisfaction to persons perfectly well qualified to judge, and so application was made to the Court of Exchequer on the same question. Now the learned Barons of that Court, as was indeed reasonable, appearing to mislike, or at least mistrust, the fictitious history and misstated facts, if not the interpretation of law as propounded by the Queen's Bench and Common Pleas, did not follow their example in refusing opportunities for additional argument and information, but granted a rule *nisi* for further hearing. Thus they took some time for consideration, thinking it, in their own words, "right that we should ourselves refer to and carefully examine all the authorities cited." Doubtless in so acting, and avoiding the examples, or rather profiting by the warnings lately supplied, they showed a wise discretion, and that discretion was rewarded by an escape from either horn of the forementioned dilemma being suggested to them. The Attorney-General of that day, who was engaged against the jurisdiction of the Convocations, finding that the decisions in his favour in the other Courts were utterly untenable on the grounds avowed, and alarmed at the exposures of those judgments which had been made, put forward a happy suggestion to the Court of Exchequer, of which it was not slow to avail itself. "Why," said the learned gentleman, "should there not be a double and concurrent appeal? If so, this rule would be discharged." Meaning, that if in a case "touching the King," a concurrent appeal lay to the Judicial Committee or to the Upper House of Convocation of the province, then the rule in this particular case would be discharged and no prohibition would issue. The learned advocate did not inform the Court or the world what final event might ensue from having two concurrent Courts of ultimate appeal in case one of the parties to a litigated suit should apply to one Court and the other party to another. But though he made no endeavour to solve this apparent difficulty, his suggestion met with remarkable favour. While the learned Barons refused to grant a prohibition in the particular case, they declined to affirm that the Upper Houses of Convocation were not final resorts in matters "touching the King." And very wisely did they thus decline to adopt the conclusions of the Queen's Bench and Common Pleas, for reasons thus assigned in their own words —"We feel, however, that the authority of Lord Coke is not to be lightly disregarded, and certainly in the 4th Institute he speaks of the Court of Convocation as a Court to which there was an appeal under the statutes in question in cases 'touching the King.' This is expressly stated under the head Court of Convocation, and again under the head of Appeals. It is true that in

Court Excheq. June 11, 1850.

Ibid.

Sir J. Jervis.

Court Exch. June 29, 1850. Sir J. Jervis's Speech.

Court Excheq. in re Gorham, Judgment, July 8, 1850.

the latter passage Lord Coke is not speaking from his own mind, but is only giving the report of Lord Dyer. But we think it must be inferred that he meant to adopt as good law what he so states himself to have received from Lord Dyer. What Lord Coke thus states, namely, that in matters which touch the King there is an appeal to the Upper Houses of Convocation, has been adopted by a great number of writers of the highest eminence. . . . . The result of the whole is, that Lord Coke, writing long after the time of Henry VIII., says there is in matters 'touching the King' an appeal to the Convocation, and many subsequent text writers of great eminence down to very modern times assert the same."

Court Excheq. Judgment, July 8, 1850.

And though the learned Barons thought this question in the case then before them "rather matter of curious speculation than of any practical importance," yet one may venture, without any rashness, to affirm that, judging from the cases of Dr. Colenso and of "Essays and Reviews"—a book whose writers were acquitted by the Judicial Committee, but censured by the Convocation of Canterbury—it might be of the greatest possible practical importance whether a cause was carried in last resort before the Judicial Committee of Privy Council or the Upper House of Convocation in either province.

Eccl. Judgments, p. 290.

Judgment, Privy Council Chamber, on Petition of Dr. Colenso, March 20, 1865.

It is true that the learned Barons, while declining to rule the main question whether the Upper Houses of Convocation were or were not final appeal Courts in "matters touching the King," did say that if they were compelled to decide it they might come to the same conclusion as the other Courts of Westminster Hall, yet some of the grounds assigned for this hypothetical agreement under possible circumstances are so very remarkable as to require some notice.

The first and chief ground was the asserted "fact that no appeal to Convocation ever has taken place during the three centuries and upwards which have elapsed since the passing of these statutes;" and consequently, that the previous judgments of the Queen's Bench and Common Pleas had adopted a construction "supported by all the practice that is known to exist on the subject and opposed by none." But the above asserted fact was no fact at all, for suits "touching the King" in the cases of Catharine of Arragon, Anne Boleyn, and Anne of Cleves—above mentioned—had been brought before the Convocations during the time which had elapsed since the passing of the statutes in question, and so the decisions of the Queen's Bench and Common Pleas were not only not supported by "all the practice known to exist," but were opposed to the most remarkable exercises of it.

Court Excheq. Judgment, in re Gorham, July 8, 1850.

Ibid.

The last ground for the hypothetical agreement of the learned Barons under possible circumstances with the two other Courts shall be given in their own words, for it is so extremely surprising

that one really fears misreporting it by any alteration whatever in its terms. "Lastly," they said, "we may remark that the statute 25 Henry VIII. c. 19, by giving the appeals in all causes ecclesiastical from the Archdeacon to the Bishop or Ordinary, and from him to the Metropolitan or Archbishop, and from him to the King, and no further (if such was the effect of the statute), did but restore the ancient law of the land as settled on this point by the Constitutions of Clarendon in the reign of Henry II., anno Domini 1164." Here two distinct propositions are involved. (1) That the ancient law of the land gave appeals in all causes ecclesiastical in final resort to the King. But this is altogether wide of matter of fact. Because the ancient law of the land, from the earliest records to the date of which the learned Barons were speaking, 1534, not only gave no final appeal in causes ecclesiastical to the King, but absolutely forbid his deciding any such causes whatsoever, as may be seen by reference to the abundant proof of this fact which has been already given. (2) The second proposition involved in the learned Barons' averment is, that their asserted provision in the ancient law of the land was settled on this point by the Constitutions of Clarendon. This is equally wide of matter of fact, as may be seen by reference to the 8th of those Constitutions. What that Constitution, the only one of the whole sixteen Articles ratified at Clarendon, which touches our present subject, did settle was, that all ecclesiastical controversies should within the realm be finally decided in the Archbishop's Court, and that is directly contradictory to the assertions of the learned Barons on this point.

Court Exchcq. Judgment in re Gorham, July 8, 1850.

Chap. iv.

Now, considering that the learned Barons did not, as it was unlikely they would, adopt the historical essay of the Court of Queen's Bench as grounds for their decision; considering that so far from adopting the criticisms of the Court of Common Pleas, on the concurrent authority of the text writers, as such grounds, they in terms dissented from those extraordinary sallies; and, considering that they averred some other grounds for their conclusion, which admitted the theory of a double and concurrent appeal, it should be clearly understood that the matter was differently ruled on different grounds in the different Courts.

The history of the Court of Queen's Bench was misliked by the Court of Common Pleas, the interpretation of the text writers by the Court of Common Pleas was misliked by the Court of Exchequer, and if the learned Barons had (1) been rightly informed on the subject of the Royal divorces in 1533, 1536, and 1540, (2) if they had been acquainted with the ancient law of the land, and (3) if they had studied the Constitutions of Clarendon in their integrity, one must suppose, from the tenor of their own argument, that even their own hypothetical agreement with the other two Courts would have been impossible. For their

three asserted grounds for that hypothetical agreement are not only no grounds at all, but the subject matter of them, if rightly reported, leads by the adopted mode of argument straightway to a directly contradictory conclusion. In place of no appeals to Convocation having taken place since the passing of the statutes, the most imposing instances of such proceedings had occurred. In place of the ancient law of the land being restored by the statute of 1534, and having given ecclesiastical appeals in final resort to the Crown, the ancient law of the land was diametrically opposed to the statute of 1534, and had consistently, continuously, unintermittingly forbidden such proceedings. In place of the Constitutions of Clarendon having settled such an asserted practice, it was by them distinctly laid down, that it should never, under any circumstances, be adopted. It is moreover, amid such contradictions, very encouraging to reflect, whatever conclusions against the sole authority of the Convocations in the matter before us were arrived at by the learned Barons in the Court of Exchequer in 1850, that two of the later ornaments of that Bench, at least, unless they saw cause entirely to change their minds since, entertained the very strongest convictions against the correctness of a judgment which they then most eloquently deprecated.

25 Hen. VIII. 19.

Argument, Court of Exchequer., July 2, 1850.

It is quite idle to say that there was a united agreement among our three Common Law Courts to the effect that the Upper Houses of Convocation were not final resorts in matters touching the King. The justices of the Queen's Bench and Common Pleas doubtless have so decided, but upon grounds such as have been above detailed. The Barons of the Exchequer have not so decided, but have admitted the theory of a double and concurrent appeal. Yet even that approach to the decision of the other two Courts was based on different grounds from those by them adopted. And, so as the Courts have varied in their judgments, and, what is still more noteworthy, have supported all their antagonism to the Convocational jurisdiction on dissimilar grounds, of which by far the most important turn out upon inquiry to be no grounds at all, it is but reason to believe that the Upper Houses of Convocation are by statute law courts of final appeal in "matters touching the King." In this belief one closely adheres to the plain meaning of the words of the statute book, and prudently abstains from contradicting the concurrent authority of an unbroken chain of all the text writers on the subject.

9. Archbishops' Courts made absolutely final.

Having considered the first change referred to as made by the Great Statute of Appeals: viz. the establishment by Act of Parliament of the Upper Houses of Convocation as final appeal courts in "matters touching the King," some remarks will now be made on the second change above set down as effected by

24 Hen. VIII. 12. 9.

24 Hen. VIII. 12. 2.
Art. viii.

that statute in 1533. The power of the Crown to permit an appeal to Rome from the Archbishops' Courts, as allowed by the Constitutions of Clarendon, was now for such classes of causes as were specified by the Act statutably annihilated, so that the Archbishops' Courts became absolutely final in those causes unless they "touched the King."

10. Doubts suggested in the vol. "Eccl. Judgments."

But though the statute is undeniably and unequivocally explicit on this subject, a high ecclesiastical authority of the present day, while deprecating the disunion which it is suggested must have arisen from allowing the independence of two metropolitans, and seeming also to have for the moment forgotten that methods for securing harmony and unity between neighbouring provinces and Metropolitans are not altogether unheard of in the history of the Church, has affirmed as follows:—"Obviously, the national unity could not be guarded by leaving each Archbishop irresponsible, hence it is scarcely probable that this arrangement was ever tried even as a temporary expedient for one year." But upon what this improbability is grounded, considering that the arrangement was decisively and in terms quite unmistakeably set out on the face of the statute book, it is somewhat puzzling to discover; and, in fact, one would have been left quite in the dark on this point if we had not found some light thrown upon it in a subsequent passage of the volume published under the same authority. We are there informed again (Introduction, p. xxxviii.) that it is doubtful if the Archbishops would have been allowed to decide finally on the causes specified arising within their several jurisdictions. And the reasons for the foregoing asserted improbability and doubt are then distinctly assigned in the following words: "Notwithstanding the stringency of the language used (viz. that the causes shall be finally determined without any other process or appeal), it might have been held that an appeal lay of common right to the King, as it was afterwards held that a Commission of Review might be issued notwithstanding the provisions in the statutes." Now, though it must be frankly admitted that these reasons for the suggested improbability in the "Preface," and for the doubts raised in the "Introduction" of the volume referred to have only clerical initials subscribed, yet it is tolerably clear from internal evidence that all the advantages of assistance and advice from some member, if not members, of the learned profession on this matter were secured, and indeed the title-page of the book, and the contents of the advertisement at p. xxii. tend to confirm such a conviction. If so, it is a fair ground of serious complaint that any learned gentleman or gentlemen should thus mislead the unwary and confiding, and should thus impose on simpler joint authors. For surely gentlemen of the long robe must know (or if they do not, here is a more serious

Eccl. Judgments, &c., Pref. ix.

24 Hen. VIII. 12. 6, 7.

Eccl. Judgments, &c., Introduc. xxxviii.

complaint still, that they advise in great ignorance) that the Court of Review, according to Coke, Gibson, Burn, and all other text writers on the subject, was in terms exclusively and wholly in the affirmative sense founded on a statute which was not passed, to speak most guardedly, till at the least nineteen months after the Act before us which constituted the Archbishops' Courts final resorts. And therefore neither the example of the Court of Review, nor the grounds on which it was founded, can with any, even the least, truth, or reason, or propriety be invoked to disable the provisions of the preceding statute, 24 Hen. VIII. 12, during the "one year" which immediately succeeded its enactment.

Inst. 341. Cod. 1083. Eccl. Law, vol. i. p. 56. 26 Hen. VIII. c. 1.

It is now time to take leave of the legislation of 1533, at the same time begging forgiveness of the reader for having detained him so long at this period of our legal and ecclesiastical history. My apology must be sought in the exceedingly rough treatment which the Act 24 Hen. VIII. 12 has received from various quarters, and meanwhile in the vital importance to the Church that its provisions respecting "matters touching the King" should be maintained in their integrity. The importance of those provisions it requires no remarkable ecclesiastical or constitutional foresight to realize. The Act itself, both in its preamble and in its contents, is a noble monument to Church authority consecrated among the annals of the country as a record of the true distinctions between functions civil and functions ecclesiastical. It was the statutable sanction of the restoration of the "Jus Cyprium" to the national Church. But these facts, so far from recommending it to willing obedience and dutiful regards, seem to have produced quite the contrary effects. For our Common Law Courts, as above detailed, have, at the expense of law and facts, and in defiance of the highest authority, treated its statutable provisions in a most unfilial spirit of legal rebellion; and the authors of the above quoted volume lately published have not only contradicted the patent evidence of history, but have invented highly imaginative and absolutely untenable suppositions in attempting to disable its powers.

Conc. Eph. Can. 8. Theoph. Angl. p. 164 sq. Eccl. Judgments, Introduc. xxxviii. ll. 5,6. Pref. ix. l. 31 sqq. Introduc. xxxviii. l. 11 sqq.

CHAPTER IX.

REMARKS ON THE CHANGE INTRODUCED BY 25 HEN. VIII. 19, A.D. 1534.

1. Jurisdiction of Upper Houses of Convocation as Final Appeal Courts, continued.—2. Establishment of Court of Delegates.—3. Power of the Crown extended.—4. "Reformatio Legum."—5. Modern Arguments touching Court of Delegates.—6. Example of Thomas Cromwell invoked in "Ecclesiastical Judgments."—7. Some Conclusions.

1. Jurisdiction of Upper Houses of Convocation as Final Appeal Courts, continued.

Vid. ch. viii.

25 Hen. VIII. 19. 3.

By the general terms of the 3rd section of 25 Henry VIII. 19, usually called the "Clergy Submission Act," the jurisdiction of the Upper Houses of the Convocations as Final Appeal Courts was continued, and indeed enlarged, so as to embrace all ecclesiastical cases, "what cause or matter soever they concerned," if they "touched the King.

2. Establishment of Court of Delegates.

26 Hen. VIII. 19.

As regards all other ecclesiastical cases, that is to say, such as did not "touch the King," an appeal was now given by the 4th section of the abovementioned Act to the Crown in Chancery, whence delegates were to be appointed in each case of appeal *pro hâc vice*. Hence the origin of the High Court of Delegates in causes ecclesiastical, and their decision, according to the terms of the statute was to be:—

25 Hen. VIII. 19.

"good and effectual, and also definitive; and no further appeals to be had or made from the said Commissioners for the same."

One readily yields to the temptation here of setting down the exact words of the statute, in order that the reader may have the advantage of admiring the remarkable ingenuity of those members of the learned profession, who justified, in the time of Queen Elizabeth and of King Charles I., the practice of constituting a Court of Review, notwithstanding the statutable words above recited, to revise, and it might be to reverse, the Decisions of this Court of Delegates. If that justification had been maintained by a high prerogative lawyer cutting, after the fashion of a dragoon, sword in hand, headlong through the statute, one's interest in the enterprise might perhaps have been less sensible; but considering that the course pursued claims to be conducted according to the approved methods of forensic engagement and argumentative warfare, one may venture to point it out as remarkably instructive. However, as the Court of Review has been statutably abolished, and is not necessarily connected with a due discussion of our particular subject, enough has been said.

39 Eliz.
4 Car. 1.

Gibson's Cod., p. 1083.

2 & 3 Will. IV. 92. 3.

3. Power of the Crown extended.

Previously to the year 1533 and the enactment of the Great Statute of Appeals, the power of the Crown in causes ecclesiastical was confined to remitting a cause to the Archbishop's Court or allowing it to be carried to Rome. But now, as we have seen, that permission having been barred by law, and the Crown having further obtained statutable authority, by 25 Hen. VIII. 19, to appoint a Court of Delegates to receive appeals within the realm from the Archbishops' Courts, a new principle, hitherto entirely unknown to English jurisprudence, was introduced into this country. For as there was no specification in this statute restricting the choice of delegates, it was rendered possible for the Crown to appoint laymen to the office. Beyond doubt such a possibility was then introduced, and though in some cases of ecclesiastical cognizance—such as those of wills, tithes, obventions, and divorces—no religious objections could be reasonably raised against laymen as judges in the last resort, yet it is very plain when questions of doctrine and of spiritual learning come into question that the whole matter assumes a totally different aspect. A remarkable confusion upon this point seems to exist in the minds of some persons who have lately devoted themselves to an inquiry on our subject. And though a strenuous endeavour has been made to show that there was a deliberate national intention then existing of introducing laymen as judges of doctrine in final resort, yet many people are entirely unconvinced by the arguments produced in proof of this assertion, and it certainly seems that very good reason for being dissatisfied with them may be found in the following considerations.

24 Hen. VIII. 12.

Sup. p. 84.

Eccl Judgments, Introduc. lii. and *passim*.

4. "Reformatio Legum."

By the same statute which established the Court of Delegates for causes ecclesiastical, a commission of thirty-two persons was inaugurated to revise the ecclesiastical law of this country; and it may be fairly presumed that the principles adopted under that provision would be the same as those which underlay the general intention of the Act. This matter originated with the consent of the Clergy to the revision of the ecclesiastical laws on May 15, 1532. The plan first received statutable authority in 1534, by the Act before us, and the matter seems continually to have engaged the attention of our authorities in Church and State, for we find enactments on the subject again repeated in 1536 and 1544, and in the following year, 1545. Consequently upon the latter statute a draft of the laws was brought to such perfection that it wanted nothing but the Royal confirmation, and indeed a letter was drawn up for that purpose for the King to sign. However, from some unexplained reason, this code was not published in the reign of King Henry VIII.

25 Hen. VIII. 19. Sec. 4.

Conc. M. B. iii. 754.

27 Hen. VIII. 15.

35 Hen. VIII. 16.

Strype's Cran, 133.

Ibid. App. No. xxxiv.

Subsequently, in the Canterbury Convocation of 1547, the first year of King Edward VI., we find a petition from the Lower to the Upper House, couched in these words, "That provision be

Conc. M. B. iv. 15.

made that the ecclesiastical laws may be examined and promulged according to that statute of Parliament in the 35th year of King Henry VIII." And so the matter was again revived statutably by 3 & 4 Edw. VI. 11, and in the fifth year of that King, 1551, the following thirty-two persons, in accordance with the provisions of the statutes above referred to, were appointed to bring the matter to a final issue:—

Strype'sCran. p. 271.

Archbishop & Bishops.	Divines.	Civilians.	Lawyers.
Canterbury	Mr. Taylor	Mr. Peter	Justice Hales
London	Almoner Cox	— Cecyl	— Bromly
Winchester	— Parker	Sir Thos. Smith	— Goodrick
Ely	— Latimer	— Taylor	— Gosnal
Exeter	— Cook	Dr. May	— Stamford
Gloucester	— P.Martyr	Mr. Traheron	— Carel
Bath	— Cheke	Dr. Lyel	— Lucas
Rochester	— J. Alasco	Mr. Skinner	Recorder Brook.

Ref. Leg. ad init., Strype's Cran. 271.

Although these thirty-two persons were now appointed in accordance with the provisions of the statutes, it appears from a letter of King Edward VI., dated from Westminster, Nov. 11, 1551, that out of this number eight were specially selected for the management of the business; that is to say, out of the Prelates, Archbishop Cranmer and the Bishop of Ely; out of the Divines, Cox and P. Martyr; out of the Civilians, Taylor and May; out of the Common Lawyers, Lucas and Goodrick. They applied themselves closely to the work, the Archbishop supervising the whole; and the result of their labours is that well-known book entitled, "*Reformatio legum Ecclesiasticarum ex authoritate primùm Regis Henrici VIII. inchoata: deinde per Regem Edovardum VI. provecta adauctaque in hunc modum, atque nunc ad pleniorem ipsarum reformationem in lucem edita.*"

Strype, Cran. 271.

This revised code of ecclesiastical law never received Royal ratification, in accordance with the statutes under which the enterprise was carried on. The matter was delayed, "partly by business and partly by enemies," and on account of the early death of the young King, and the change of policy in the next succession, the whole matter slept. But though the contents of this code are not legally binding, it is of extreme historical value, as showing what were the opinions of our reforming statesmen and divines on the subject here treated of, what were the regulations which they thought expedient for the welfare of the nation and of the Church, what were the intentions of the Legislature, and what would have been the authoritative rules of ecclesiastical law and policy if those intentions had been fairly and finally carried out. For it is to be remembered, that we have embodied in the "*Reformatio Legum*," not haphazard thoughts thrown off under stress of time, but the well-digested results of the labours

of the most renowned divines and statesmen, undertaken and carried on under the auspices of two proceedings in Convocation, of four Acts of Parliament, of at least two Commissions, and under the special directions of two successive Sovereigns. And as these labours were statutably originated by the selfsame Act as that which established the Court of Delegates it is surely to the "*Reformatio Legum*" that we may fairly look for an enunciation of the principles and a direction of the practice which, as was then intended, should govern that Court in causes ecclesiastical. Moreover, the contents of the book itself confirm the reasonableness of such a conclusion.

Conc. M. B. iii. 754. Ibid. iv. 15. 25 Hen. VIII. 19. 27 Hen. VIII. 15. 35 Hen. VIII. 16. 3 & 4 Ed. VI. 11. Ref. Leg. in Tit. 25 Hen. VIII. 19.

Now, in the first place, it is observable that in this book, under the title *De judiciis contra hæreses*, the very subject of our inquiry, the first chapter lays down the gradation of the proceedings in exact accordance with the statute establishing the Court of Delegates: viz. "From the Bishop to the Archbishop, and from the Archbishop to the Crown." And then, under the title *De Appellationibus*, the subject of appeals is fully treated of, and in the 11th chapter the whole gradation is specifically laid down. There the appeal from the Archbishop's Court, as settled by the statute 25 Henry VIII. 19. 4, is mentioned as lying to the Crown, and then these words are put into the Sovereign's mouth: "And when the cause shall have been referred hither we desire to conclude it by a provincial synod, if it is a grave cause, or by three or four bishops to be appointed by us for the purpose." * Thus we learn of what the Court of Delegates for the purposes under view was in ordinary causes to have been composed, i. e., of three or four bishops, according to the spirit and intention of our reforming divines and statesmen, and it may be fairly supposed of the legislation which established it. But in the grave causes it was ruled that the appeals from the Archbishops' Courts to the Crown should be settled, not by delegates at all, but by reference to a provincial synod, thus assimilating the final resort in such causes to that which was already statutably established for "cases touching the King."

Ref. Leg. De Jud. Cont. Hær. c. i.

Ref. Leg., De Appel. c. xi.

24 Hen. VIII. 12. 9.

5. Modern arguments touching Court of Delegates.

Notwithstanding this evident intention, that the final resort in ecclesiastical appeals should be a spiritual one, i. e., either to a Convocation or to three or four bishops, as testified by the above-mentioned results of the Commissions appointed under the pro-

* "Ab Archidiaconis, Decanis et his qui sunt intra pontificiam dignitatem, et jurisdictionem Ecclesiasticam habent, ad Episcopum liceat appellare, ab Episcopo ad Archiepiscopum, ab Archiepiscopo vèro ad nostram majestatem. Quo cum fuerit causa devoluta, eam vel concilio provinciali definiri volumus, si gravis sit causa, vel à tribus quatuorve Episcopis à nobis ad id constituendis. Quibus rationibus cum res fuerit definita et judicata per appellationem, amplius cognosci non poterit."—Ref. Leg., Tit. App. c. xi. "Quo ordine appellandum sit."

25 Hen. VIII. 19.

visions of the same statute which gave appeals from the Archbishops' Courts to the Crown, the most laborious endeavours have lately been made to show that from the beginning it was meant that the Court of Delegates should have a large infusion of laity, and that such intention has continuously been carried out in practice. Indeed, some ingenious calculations, and some rather tedious applications of the rules of proportion, have been brought to bear on the subject. But it must be said that these laborious engagements have been considerably misdirected, and that a vast amount of trouble has been in a great measure thrown away. For, of all the items subjected to these arithmetical manipulations, not one touches the real pith and marrow of the question before us; not one of the one thousand and eighty cases brought into the calculation, and further dissected according to the quality and character of the individual judges, having been a case involving doctrine. It really seems as though the associated compilers of the volume before us had entirely failed to distinguish the vital difference existing between cases technically called ecclesiastical and such as embraced questions involving heresy and false doctrine. No man would now feel aggrieved that testamentary, or matrimonial, or tithe, or patronage suits of secular contention should be concluded by laymen, be they noblemen, civilians, or common law judges; but, nevertheless, many men feel the extreme impropriety of remitting doctrinal questions in final resort to such authorities. I must therefore think that a large amount of investigation, calculation, and ingenuity has been quite wasted, not to say misapplied, on this head by the authors of "*Ecclesiastical Judgments*," &c.

Eccl. Judgments, Introduc. lii.

Eccl. Judgments, Introduc. li.—vi. Mr. Gladstone's "Hist. Remarks," pp. 76, 77. Parl. Pap. 322, Sess. 1850.

The real question which moves men's minds is, whether doctrine should be, so far as the power of a Court goes, and that is a long way, defined by lay authority. As for precedent, which has been so firmly relied on, the history of the Court of Delegates in this respect gives us very scanty lessons. For not one case involving doctrine, so far as we know, and great pains have been taken to procure knowledge, was ever tried in the Court of Delegates till 1690, i.e. for 156 years after the establishment of the Court. And as regards the 142 years which elapsed between 1690 and its annihilation in 1832, only four such cases at most are found on record.

Eccl. Judgments, Introduc. xlv.—vi.

During the first period of 156 years above referred to (1534—1690), questions relating to doctrine were not then brought on appeal before the Court of Delegates at all, because shorter methods were resorted to in the Star Chamber and High Commission, leaving the foulest stains of tyranny and oppression on the pages of our national history. And so during that period there is positively nothing whatever in the records of the Court of Delegates to contradict the intention expressed in the "*Re-*

Eccl. Judgments, lvi. lviii., and Parl. Pap. 322, Sess. 1850.

formatio Legum" above mentioned, that when a cause was carried to the Crown in Chancery it should be referred, if "a grave one," to a provincial synod, or if not "grave" to three or four bishops. On the contrary, such a course would have been far more agreeable to the constitutional principles laid down at that very period, by the highest authorities, on the most solemn occasions and in the most impressive records, than any reference to lay authority. Those principles may be found emphatically expressed in King Henry VIII.'s own announcements to the clergy of the province of York, in his letter of business to the Canterbury synod in 1640, in the preamble to the Great Statute of Appeals, in the Injunctions of Queen Elizabeth in 1559 statutably confirmed, in the royal declaration prefixed to the Thirty-nine Articles of Religion, and in the twentieth and thirty-seventh of those Articles themselves, ratified both by Crown and Parliament.

Sup. p. 87, and note.

Conc. M.B. iii. 765. Burn. Hist. Ref. Records ad. an. 24 Hen. VIII. 12. Sparr. Coll. p. 83. Eliz. i. 14. Pref. 39 Art. 13 Eliz. 12, Card. Syn. i. 53. sq. 73 sq. notes.

As regards the second period, of 142 years, above referred to (1690 to 1832), we certainly have precedents of appeals doctrinal or disciplinary in four cases at most—not a very imposing number. Yet, while it is frankly admitted that laymen did sit on those cases, it must be remembered that this occurred during a period of our history when the original intentions which governed the establishment of the Court of Delegates had not unaccountably slipped from memory, and moreover, when our national managements respecting ecclesiastical affairs should with all reason be viewed in the light of warnings, not of examples.

6. Example of Thomas Cromwell invoked.

In the volume published under very high ecclesiastical authority, a startling method has been adopted by way of establishing the propriety of introducing laymen into Courts for the decision of doctrine. The example of King Henry VIII.'s Commissions to Thomas Cromwell is invoked, and the borrowed decorations with which that person was adorned are paraded with an appearance of considerable satisfaction. The authors do not inform us whether they approve of his nomination, though a layman, to the Deanery of Wells; but they report, with much seeming gratification, that, but for physical impossibilities, this favoured layman would have been called upon to exercise episcopal functions by ordaining fit persons to the order of the priesthood. One is not quite sure that the writers have here quite rightly interpreted the meaning of the authorities which they have quoted, and on which they rely; but, at any rate, having arrived at their conclusions they appear to hail them with considerable satisfaction. This is somewhat surprising when one recalls some names which appear among those of the chief contributors to the work. Even if the reported propinquity of this layman to the pretended function of conferring Holy Orders should be gladly hailed by the legal mind, as a forensic argument in favour of the principle of lay

Eccl. Judgments, Introduc. xxxii.

Rose, Biograph. Dict. in nom.

Eccl. Judgments, Introduc. xxxiii. and note.

jurisdiction over matters of doctrine, one would hardly have expected that such a consideration would have readily commended itself to ecclesiastical regards. However, it seems to have met with very favourable acceptance in such quarters. And further, we are reminded in the same volume of Thomas Cromwell's precedence before the Archbishop in the House of Lords and of his presidency in Convocation, as arguments for lay supremacy in ecclesiastical matters. But considering the auspices under which this book was published, and the acknowledged authorship of the Preface and Introduction, in place of seeing the fantastic eccentricities of Thomas Cromwell and his Royal patron paraded for approval, it would have accorded more nearly with one's reasonable expectations to have found the words of our most learned Church historian repeated, when he thus writes on this subject, "The figure that Cromwell made . . . . was somewhat singular, especially since he had neither birth, learning, nor character to bear him out;" or one might have rather expected to have been reminded of Bishop Godwin's remarks on the same matter in the following language: "For an ignorant layman to preside in a synod of the most learned bishops that ever were in England, was but a scandalous sight. If this function could have been executed by one of the laity, the King would have done much better in person than by such a proxy."

Eccl. Judgments, Introduc. xxxii.

Coll. Ecc. Hist. iv. 343.

See also Burnet, vol. ii.

Annal. p. 59.

7. Some conclusions.

In fine, from considering all the circumstances of the case, one gathers: 1. That, at the first institution of the appeal to the Crown in Chancery by the Act before us, it was intended that in cases of doctrine the cause, by Royal order, should go either to a provincial synod or to three or four delegated bishops. 2. That this Court of Delegates sank into disuse during the tyrannical usurpations of the Star Chamber and High Commission. 3. That after their annihilation, when the Court of Delegates was revived, from lapse of time the principles of its original constitution were forgotten. 4. That thus instances of doctrinal cases having been carried in later times before lay delegates may be quoted. 5. But that these are so few, being only four at the most, as under the conditions of the case to afford no valid precedent for a continuance of a like practice.

25 Hen. VIII. 19.

Ref. Leg.

CHAPTER X.

REMARKS ON THE CHANGE INTRODUCED BY 2 AND 3 WILL. IV. 92, A.D. 1832.

1. Reports of Commissioners in 1831-32.—2. Star Chamber a Committee of Privy Council.—3. Court of Delegates abolished, Functions transferred to the Privy Council.—4. A Constitutional Miscarriage.

1. Reports of Commissioners in 1831-32.

In the years 1831-32, two Commissions, composed of persons high in Church and State, sat and reported on the subject of ecclesiastical appeals. The Court of Delegates had fallen into disfavour, and the Commissioners reported that "the Privy Council, being composed of Lords spiritual and temporal," with other specified persons, "seems to comprise the materials of a most perfect tribunal for deciding appeals from the ecclesiastical Courts." From this recommendation one gathers that these Commissioners did not feel the same objection to confiding judicial functions to the Privy Council as were entertained by our forefathers. It is patent on the annals of the country that the English Legislature aforetime displayed extreme unwillingness to recognize that body as a Court of justice; and, indeed, that unwillingness was expressed in the following very intelligible terms:— Eccl. Judgments, Introduc. lviii.—ix.

"Be it likewise declared and enacted, that neither His Majesty nor his Privy Council have or ought to have any jurisdiction, power, or authority . . . . to examine or draw into question, determine, or dispose of the lands, tenements, hereditaments, goods, or chattels of any of the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary Courts of justice, and by the ordinary Courts of Law." 16 Car. I. 10. 5.

And though it may be said that these words refer rather to civil than to ecclesiastical suits, yet a general unwillingness to recognize the Privy Council as a Court of justice at all is here manifested.

2. Star Chamber a Committee of Privy Council.

And at this unwillingness one cannot at all wonder, considering the odious tyranny of the Star Chamber, which was nothing more nor less than a Committee of the Privy Council; for the Court of Star Chamber, as its records prove, was the Privy Council meeting in the Starred Chamber—the "Camera Stellata"—so called, in all likelihood, from the emblazonment of stars upon its ceiling. Thus there were very sensible echoes of the past sounding forth warnings of extreme alarm. And, moreover, there are some present practices of the Privy Council, connected with its judicial functions, by no

means commending it for acceptance as a final Court for ecclesiastical appeals. Assuming all the functions of a Court, there is yet a hazy mystery about its proceedings which is far from encouraging. Its final determinations, though really having the force of judgments, pretend to be only recommendations to the Sovereign, and no positive acts of its own. The members do not deliver their opinion severally, but the minority are bound by the majority, and, however widely or wisely they may dissent, are presumed not to divulge their reason for such dissent. That is eminently unsatisfactory. If the most learned members of the Court should not agree with the majority, it is but right, according to the received practice of English jurisprudence, that those most interested in the cause (i.e. in this case the faithful members of the Church of England) should at least know the reasons for such disagreement. However, notwithstanding these and other discouragements, the Commissioners of 1831 and 1832 reported in favour of transferring the functions of the Court of Delegates to Her Majesty's Privy Council.

3. Court of Delegates abolished, functions transferred to Privy Council.

Sup. p. 87.

In accordance with the Commissioners' report, the Legislature — seemingly forgetful of the principle contained in the "*Reformatio Legum*," above referred to, that when a "grave" cause was referred to the Crown, it should be adjudged by a provincial synod or if not "grave" by three or four bishops—abolished, by 2 and 3 Will. IV. 92, ecclesiastical appeals to the Crown in Chancery, and substituted appeals to the Crown in Council. By this legislation, practically, the Court of Delegates was annihilated, and Her Majesty's Privy Council became the final tribunal in causes ecclesiastical; and this change took effect on February 1, 1833.

2 & 3 Will. IV. 92. 3.

4. A constitutional miscarriage.

Thus, if at that conjuncture of our national history an ecclesiastical appeal had chanced to be carried to final resort, some managements would have been rendered necessary of no very encouraging aspect. To have entailed them upon the jurisprudence of the country can hardly be looked upon in any other light than as a constitutional miscarriage. The appeal would have lain, as we have seen, to the whole Privy Council. Now it is unnecessary to dilate on the unfitness of that body as a whole, composed of the most heterogenous elements, to discharge the functions then assigned to it, or on the impractibility of obtaining its judgment in its entirety, as from the year 1679 no idea has been entertained of making all Privy Councillors responsible for constitutional or political acts. The whole Council has indeed, as a matter of form, been sometimes summoned, as, for instance, on the occasion of the signature of the peace of Utrecht; but such useless parade is now entirely abandoned. And so, if an ecclesiastical appeal at the time before

us had been lodged, we cannot suppose that the Privy Council, increased in bulk proportionably to its decrease in political responsibility, would have been called together. One must suppose, though it is only a supposition, that the same course would have been pursued which had been aforetime followed in East Indian and colonial causes; that is to say, that a Committee out of the whole Council would have been selected by itself *pro hâc vice* to try the case, and to make a report, upon which final judgment would have been given. If any other supposition can be suggested for meeting the difficulty, one would be glad to be informed of it. But if the one above-named is the only possible one, it remains to be said, that for ecclesiastical purposes the Star Chamber would have thus been again unmistakably revived, and we should have recognized that institution, which had been so sedulously and carefully annihilated again introduced in its most objectionable features, and restored in form and substance by an Act of the Legislature. This most alarming state of affairs was however subsequently, to some extent, unwittingly altered by a statute, the effects of which we shall now proceed to consider.

3 & 4 Will. IV. 41.

16 Car. I. 10.

2 & 3 Will. IV. 92.

CHAPTER XI.

REMARKS ON THE CHANGE INTRODUCED BY 3 & 4 WILL. IV. 41, A.D. 1833.

1. The System introduced in 1833 by an Accident.—2. Detail of that Accident. —3. This Accident disallowed as such in "Ecclesiastical Judgments."

1. System introduced in 1833 by an accident.

In 1833 the system which prevailed until lately in final ecclesiastical appeals was introduced, but by an accident and mistake. The present Court, which some people seem inclined to defend and perpetuate with incomprehensible pertinacity, unquestionably derives its authority over the causes under consideration from an unhappy mischance, and had ecclesiastical appeals, as one may say, fortuitously tossed to its lot. Plain as this is to anybody who takes the trouble to give common consideration to the matter, it has been denied in high quarters though, it must be said, without even a show of reason—that any accident at all occurred on this occasion. The evidence however of a legislative mishap is too clear to admit of any doubt whatsoever.

2. Detail of that accident.

In the year 1833, the Legislature, desirous of assimilating the process in Admiralty and prize appeals to that thenceforward to be established for Colonial appeals, enacted the statute 3 and 4 Will. IV. 41. Colonial appeals, previously to this time had been heard before a Committee of Privy Council, but that not a Committee definitely specified by law. As, however, it was now determined that the two classes of causes above referred to should be amalgamated, so it was deemed right to specify by law a certain number of the members of the Privy Council, who should form a Court for the purpose in hand. And thus a new Court of persons precisely specified was established by statute. The judicial Committee of Privy Council, in fact, became at that epoch of our legislative history (1833) a new statute law Court, and whatever shadowy and hazy fictions connected with Royal supremacy or prerogative may be supposed by some persons to float about it, and however pertinaciously such fictions may be commended for acceptance to the unwary by certain methods of proceeding prevailing in the Court itself, yet all this mystery is sadly misleading. For all practical purposes, and in all essential effects, the Court is like any other superior Court, except in the matter of novelty, being the new creation of a very modern statute.

Now, when the statute under view was drafted, with the intention, as above said, of subjecting Admiralty and Colonial causes to this fresh tribunal, the Courts which were meant to be affected by the new legislation were specified in the enacting clauses with careful particularity and exact precision. There we find detailed the High Court of Admiralty in England, the Lords Commissioners in Prize Cases, the Vice-Admiralty Courts, the Courts in the plantations of America and other His Majesty's dominions abroad, the Courts of Sudder Dewanny Adawlut in the three Presidencies of India, each being nominally designated, and the Courts of judicature to the eastward of the Cape of Good Hope. In fact, the specification of the jurisdiction intended to be submitted to this new Court of final appeal—the Judicial Committee of Privy Council—is most particular. But one looks in vain through the enacting clauses of the statute for any mention of any one ecclesiastical Court whatsoever. Not a syllable there occurs touching any cause of an ecclesiastical character, much less any cause of doctrinal or spiritual contention. It is perfectly clear that there was no settled intention of submitting any judgments of an ecclesiastical Court to this new tribunal.

3 & 4 Will. IV. 41.

Sec. 2.

Sec. 22.

Sec. 24.

And this inevitable conclusion from the contents of the statute itself is confirmed by the other considerations of the most convincing character.

1. The Commissioners of 1831-32 on the subject of ecclesiastical appeals had previously reported, that: "the Privy Council being composed of Lords temporal and spiritual, &c. . . . seems to comprise the materials of a most perfect tribunal for deciding appeals from the ecclesiastical Courts." Thus the Commissioners evidently thought that one reason for recommending the Privy Council as containing elements fit for the composition of a Final Appeal Court in matters ecclesiastical was, that the Privy Council was partly composed of "Lords spiritual." But when the Judicial Committee was constructed by the Act before us, not one single spiritual person was appointed as a member of that Court.

3 & 4 Will. IV. 41.

2. Lord Brougham, the chief author of the act in question, gave his unimpeachable testimony to the legislative blunder which occurred in submitting ecclesiastical appeals to the Judicial Committee when he thus subsequently addressed the House of Lords: "He could not help feeling that the Judicial Committee of Privy Council had been framed without the expectation of [ecclesiastical] questions . . . . being brought before it. It was created for the consideration of a totally different class of cases, and he had no doubt but that if it had been constituted with a view to such cases as the present [the Gorham case] some other arrangement would have been made."

Hans. 3rd S. vol. cxi. p. 629.

3. The late Bishop Blomfield also added his testimony to that

of Lord Brougham, in declaring that the transfer of spiritual appeals to the Judicial Committee of Privy Council was caused by a mistake and accident. The words of that venerated prelate, when speaking of the creation of this new tribunal, were, that the "question of doctrinal appeals was not alluded to;" and he added, that "the contingency of such an appeal came into no one's mind." His Lordship's testimony moreover on this subject derives all the more weight from the fact that he was a member of both Commissions which, in 1831 and 1832, as above stated, had reported on the subject of ecclesiastical appeals.

Hans. 3rd S. vol. cxi. p. 600. Ibid.

But how, it may be asked, if there was no intention of committing ecclesiastical appeals to the Judicial Committee of Privy Council as constituted in 1833, did it come to pass that they were transferred thither? This mischance arose from that excessive love of verbiage and unnecessary amplification which appears often to beset those to whom the duty of drafting Acts of Parliament is committed. The draftsman of the statute which conferred this jurisdiction though exactly specifying the Courts which were to be included in the new legislation (not a hint at any ecclesiastical Court whatsoever appearing in the enacting clauses) permitted himself in the commencement of a section in which he was about to provide for appeals then pending and unheard, to launch out into some wide and undistinguishing language which unintentionally, so far as the Legislature was concerned, involved ecclesiastical causes in their too ample embraces. And though no hint of any ecclesiastical Court or cause whatsoever occurs throughout all the enacting clauses of this statute, yet the unhappy over-capaciousness of the aforementioned wordy section did unintentionally to our legislators entail the evil which the Church of England has never since ceased to deplore.

3 & 4 Will. IV. 41.

Sec. 3.

3. This accident disallowed as such in Eccl. Judgments.

Notwithstanding the above-mentioned irrefragable evidence that the Judicial Committee of Privy Council has obtained jurisdiction over spiritual causes by misadventure, it is worthy of observation, that this fact has been disallowed in the volume printed under very high ecclesiastical authority. In the preface to that work it is, to say the least, most broadly suggested that no mistake at all occurred. And the Most Rev. author moreover, in a speech addressed to the Upper House of Convocation, February 17, 1865, evidently grounded on the same reasons as those assigned in his Grace's preface, distinctly affirmed his conviction that ecclesiastical appeals were referred to the Judicial Committee of Privy Council intentionally and of purpose by the Legislature. His words were as follows:—

Eccl. Judgments, Pref. pp. vi. vii.

Chron. Con. 1987—8. An. 1865.

"I entertain a very strong opinion that [the Court] was framed with a very distinct reference to this subject [ecclesiastical appeals], and I ground that opinion, as I have stated *elsewhere*, on this fact—that the Court assumed its

present form in consequence of the recommendations of a Commission, of which Archbishop Howley, Bishop Blomfield, the late Bishop of Lincoln, and other prelates formed a part. . . . . The Court was constituted in consequence of the recommendation of that Commission. Therefore, if the Court was fitted for its other duties, I think it was the intention of those who formed it to qualify it for the performance of these [ecclesiastical appeal] duties also."

The same conviction is also expressed in the Charge of the Archbishop of Canterbury when Bishop of London (1866), in the following words:

"I maintain now, as I have done elsewhere, that the particular arrangement by which these principles are now upheld in England, was most deliberately adopted, after careful evidence, on the recommendation of a Commission, in which Archbishops Howley and Vernon, and Bishops Blomfield and Kaye served."

It is, however, quite evident that the most serious misapprehensions are here involved. So far from the Judicial Committee of Privy Council having been armed with ecclesiastical jurisdiction in conformity with the recommendations of the Commission referred to, the constitution of the Court is quite antagonistic to a most important part of the Commissioners' report, as has been before detailed. For when the members of the Court were specified by law, the subject of ecclesiastical appeals, to use the language of one of the Commissioners themselves—Bishop Blomfield, as above referred to—"came into no one's mind." The truth is, that the present Archbishop of Canterbury manifestly confused together two distinct events, which occurred on two very different occasions. One was the transfer of the jurisdiction of the Court of Delegates to the whole Privy Council by the statute of 1832, the other was the transfer of that jurisdiction from the whole Privy Council to the Judicial Committee of that body by the statute of 1833. No one suggests that any mistake occurred on the first occasion. The transfer, whether a wise one or not, took place doubtless on premeditation, and in conformity with the recommendation of the Commissions above mentioned. But a most deplorable mistake occurred on the second occasion, and the Judicial Committee obtained its present jurisdiction over ecclesiastical causes, not in accordance with any intention of our legislators, as the most conspicuous of them of that time have themselves declared, but in direct contravention of the contents of that Report of Commissioners which was prepared and presented on this very subject.

Sup. p. 95.

Sup. p. 96.

2 & 3 Will. IV. 92.

3 & 4 Will. IV. 41.

It is almost impossible to conceive a legislative blunder greater than that which then occurred, and which has entailed disastrous consequences on the Church. If it had been a matter touching the goods of this world,—if glebes, rent-charges, houses and gardens, came into jeopardy by an error,—there would have been sufficient outcry and sufficient sympathy to ensure a remedy. But though this was an evil of far greater gravity, and of most

important significance to the integrity of the Church's faith, there was considerable difficulty in arousing men's minds to a full sense of its magnitude, and impressing them with a due conception of the need which existed for some well-considered reformation. Such reformation has only been now partially and insufficiently supplied by the appointment of spiritual persons as assessors to the Judicial Committee of Privy Council under the provisions of the Judicature Act, 1876. For these assessors—even if the case called for no further remedy—are not appointed in such a manner as to secure the confidence of the Church and the expression of her voice.

CHAPTER XII.

REMARKS ON THE CHANGES INTRODUCED BY THE CLERGY DISCIPLINE ACT 3 AND 4 VICT., C. 86, A.D. 1840, AND BY THE JUDICATURE ACT 39 AND 40 VICT., C. 59, A.D. 1876.

1. The present final Appeal Court a purely lay tribunal.—2. Devoid of Spiritual jurisdiction.—3. Impotence of Court as an Ecclesiastical tribunal.

1. The present final Appeal Court a purely lay tribunal.

Before the year 1876 attempts were made by two expedients to put a fairer face upon the Judicial Committee as a tribunal for hearing Ecclesiastical Appeals, and to give it the semblance of a Spiritual Court. This was done first either by the addition of two spiritual persons by Royal Sign Manual to "attend the meetings:" or secondly by a clause in the Clergy Discipline Act, 1840, which provided that such spiritual persons as were Privy Counsellors should be members of the Committee in such cases.

This transparent varnish however was entirely wiped away by the Judicature Act of 1876. The Court is now composed of lay Judges, and of lay Judges only. It is the creature of modern statute law and has no more claims to the title of an Ecclesiastical Court than any one of the divisions of the present High Court of Justice. It is a great mistake to suppose that a Court is an Ecclesiastical Court because it tries Ecclesiastical cases. The Court of Queen's Bench in hearing cases of "Quare Impedit" —either of the Common Law Courts in hearing cases of prohibition against Ecclesiastical Courts—the Rolls Court in trying Dr. Colenso's case—magistrates in petty sessions formerly hearing Church rate cases—a County Court Judge in entertaining a plaint for a sexton's fee—no doubt these all are Ecclesiastical cases; but no man can be bold enough to affirm that the Queen's Bench, Exchequer, Common Pleas, Petty Sessions, or County Court ever were Ecclesiastical Courts. This may be further illustrated by two special instances, an ancient and a modern case may be quoted. In the first case, a clerk, named John Holmes, was presented to the Church of Tetcott, in the diocese of Exeter: the Bishop of that day refused to institute him; on which the patron, one Specot, entered an action against the Bishop in the Court of Queen's Bench. In his defence, the Bishop pleaded that Holmes was *schismaticus inveteratus*. That plea was admitted as sufficient, if true; but, the Court holding itself to be no judge of heresy, judgment was entered that there

Specot's case Coke's 5th Rep.

should be "a writ to the Archbishop," who was to certify whether Holmes was *schismaticus inveteratus* or not. The second case is quite one of modern date. On the 11th of June, 1850, a writ was issued from the Queen's Bench, and directed to the Archbishop of Canterbury, requiring him to cite certain persons, and after inquiry, to certify to the Court upon a question of false doctrine alleged in a plea which had been there put in. Thus, when Spiritual questions come before Secular Courts, the principle of proceeding, as commended in our national jurisprudence, is not only distinctly established in theory, but has been illustrated by practice. The principle is simply this, that in questions of doctrine the Secular Courts are to certify to Divines to say whether the opinions in question are false doctrine or no.

Gorham *v.* Bp. of Exeter.

Vid. Sup. p. 32.

2. Devoid of Spiritual Jurisdiction.

The Judicial Committee of Privy Council as now constituted is a Civil Court which tries Ecclesiastical causes. But it is entirely devoid of any Spiritual Jurisdiction whatever. That ends with the Archbishop's Court. The power of administering spiritual censure *pro salute animæ*—of depriving of Holy Orders—of excommunication and such like, it does not possess. The Judges can neither themselves exercise such jurisdiction, nor, to adopt the fiction of the Court, can they recommend the Crown to do so. For neither the Court nor the Crown possess it. No one ever yet heard of a Sovereign claiming such authority, and as for the Court itself, being the creature of Parliamentary Statute, it cannot thence derive a power which does not exist in Parliament itself; when our ancestors in past ages referred the judgments of the Spiritual Courts to the cognizance of the Crown they were in their generation wiser than our modern legislators. This is attested by two facts: (i) By the constitutions of Clarendon by which it was ordained that for failure of justice in the Archbishop's Court recourse should be had to the King, but it was provided also that the case should be referred back to the Archbishop, so that it might be again heard by a spiritual tribunal and the proceedings carried on according to the methods of a Court Christian. (ii) When appeals were given to the Crown by 25 Henry VIII. c. 19, the delegates to be appointed by the Sovereign, as we are assured by the contents of the Reformatio Legum, were to be "three or four Bishops."

It is plain from these instances that our ancestors had clearer notions of the distinction between Civil and Spiritual Jurisdictions than prevail among ourselves. The present final lay appeal Court originating in an accident, and patched up by modern legislative incompetence, is as little qualified to pronounce and as impotent to enforce a sentence of pure Spiritual cognizance as its members individually or collectively are to confirm a catechumen,

administer the Holy Communion, ordain a clergyman, or consecrate a Bishop. If any reader (should there be such) disputes this proposition he had better not waste his time in the perusal of these pages because as the writer and reader are not agreed on their premisses all logical reasoning is impossible and useful argument hopeless.

It is not only a prime elementary principle of jurisprudence but manifest to common sense that jurisdiction cannot be delegated by such as do not possess it. The Emperor of Germany can no more create a jurisdiction in Westminster than Queen Victoria can in Berlin. Nor can the Crown or Parliament, a body not exclusively even Christian, create a Spiritual jurisdiction anywhere which is not inherent primarily in themselves.

3. Impotence of Court as an Ecclesiastical tribunal.

Here then we are brought face to face with this difficulty, that a Court professing to try Ecclesiastical cases in last resort, if the cause be "a grave one," lacks the power of pronouncing or at any rate of inflicting such spiritual penalties as "a grave cause" demands, and further is wholly impotent by its decisions to bind the conscience of any man. And it must be here understood that its power over persons or property is not questioned, as in such matters Parliament is supreme and so can confer external co-active power on the Judicial Committee, but here only its Spiritual Jurisdiction is absolutely denied. How this difficulty may be met shall be considered in the following chapter.

When every semblance of a Spiritual tribunal had disappeared from the Judicial Committee by the Judicature Act of 1876, a provision was made that it should be advised by Ecclesiastical Assessors not being members of the Court. These were to be appointed by order in Council. And this has since been done. A rota has been established by which the Archbishops of Canterbury and York, and the Bishop of London, act as assessors for one year each: the cycle being repeated. In like manner the four junior Bishops act for a year, then the next four in the ensuing year, and so on until the whole number of the Episcopal Bench is exhausted, when this cycle again recurs.

Now by this arrangement it is plain that the five prelates, whose turn it may be to act as assessors in any particular year may not be those members of the Episcopate who are best qualified for the purpose in hand, or those who might be most generally acceptable as representing the voice of the Church.

CHAPTER XIII.

POSSIBLE REMEDIES.

1. Blundering of the Court.—2. Graver reasons for Reform.—3. Suggested Remedies.—4. In an Ordinary Cause.—5. In "a Grave Cause."

1. Blundering of the Court.

It cannot be doubted but that some salutary remedies should be applied in order to prevent the disastrous recurrence of such errors as have been committed by our present Court of final appeal, and of such proceedings as have brought discredit on its character and injury to the Church. Their number is legion. Space would fail to detail them in full. Some few instances, however, shall be here given by way merely of specimen.

Gorham *v.* Bp. of Exeter. Liddell *v.* Westerton.

1. It adjudged the Catholic doctrine of Baptism to be an open question.—2. It declared that in the Communion Office of the Second Prayer Book of Edward VI.'s reign there was no Prayer of Consecration, though in that book the Prayer of Consecration is in almost identical words with those of our own Prayer Book.

Privy Council Judgments. Petition of Dr. Colenso, Mar. 20, 1865, on Petition of Dr. Colenso, Judgment ad init.

—3. It ruled that the Crown had no power to create Bishops of Capetown and Natal by letters patent, and meanwhile affirmed that the Bishops of Capetown and Natal were "creatures of English law" exercised through "letters patent."—4. It decided that "everlasting" did not mean "lasting for ever," and whitewashed the heresy of Origen, condemned by the Fifth Œcumenical Council, on the restitution of the wicked.—5. In exercising ecclesiastical jurisdiction it treated of the awful mysteries of the eternal world in such tone and language as to extort complaints and remonstrances from the legal advocates engaged before it, and to render subsequent apologies and explanations necessary on the part of the chief mouthpiece of the Court.

Fendall *v.* Wilson. Ibid.

Martin *v.* Mackonochie.

—6. On December 13, 1868, it affirmed that the words in the Rubric which precede the Prayer of Consecration and direct the Priest to stand before the table applied to the whole sentence; but on February 23, 1871, it ruled that the Priest must stand at the north side of the table, and so condemned the defendant for standing before the table.—7. It ruled, March 21, 1857, that the same "dresses" might be worn as were authorized by the first Prayer Book of King Edward VI.; on two other occasions that such "dresses" were illegal, virtually interpreting the words "shall be retained and be in use," which occur in the Ornaments Rubric, in the contradictory sense, viz., that the

Hebbert *v.* Purchas.

Liddell *v.* Westerton. Hebbert *v.* Purchas, and Appeal Rev. C. J. Ridsdale, May 12, 1877.

vestures in question "should not be retained, and should not be in use."—8. In 1871, it assigned certain visitation articles to Bishop Cosin, as issued in the year 1687, whereas that prelate had been then in his grave fifteen years.

It has indeed been hypothetically suggested in a volume published under the highest authority that the Judicial Committee of Privy Council "does its work well." Eccl. Judgment, Preface 1865.

But if the above specimens of its performances, many of which were achieved before the publication of the volume alluded to, warrant the suggestion that the Court "does its work well," it would be very instructive to be informed what amount of ignorance displayed, of misstatement, misbehaviour, mismanagement, and self-contradiction would justify anyone in asserting that it did its work ill.

2. Graver reasons for reform.

But independently of the question of providing safeguards against the recurrence of such results as have been witnessed under the present system, some graver reasons remain in the background which point to the necessity of a reform in the constitution of the present Court of Appeal. It is, as above said, a purely secular tribunal, not one spiritual person being a member of it. Still it affects to wield jurisdiction both civil and spiritual, and to pronounce final sentence in all causes ecclesiastical. Though amply armed with civil jurisdiction it manifestly lacks the spiritual jurisdiction necessary for executing the functions of a final court. Two jurisdictions being needful for its purposes, it is only possessed of one. Spiritual jurisdiction it has not received by delegation, for Parliament not possessing it has no power to confer it, nor is such jurisdiction inherent in its members as they are all laymen. Its impotence for the functions with which it is charged will be manifest from some very simple considerations, it being borne in mind that the very reason of its being is to reverse on occasion sentences of the spiritual courts below.

Suppose then the Archbishop's Court, from which appeal is carried, pronounced a sentence of excommunication—how can this Court give relief from such a sentence? No man of competent information can contend for a moment that it could do so. Should the case be reversed on appeal, the person sentenced could find no relief to his conscience (if he had the faintest conception of the principles of Church government) nor feel himself justified in presenting himself for the reception of the Holy Communion. Nor would any clergyman sensible of his duty and obligations administer It to him.

Now to reverse the picture. Supposing, in a charge which if proved would involve the penalty of excommunication, that the Archbishop's Court had acquitted the person so charged, how is the Court of Appeal to reverse the sentence? It possesses no more power to pronounce a sentence of excommunication than Her Majesty's Lord Justices of Appeal, the Judges of either of the divisions of the High Court of Justice, a Judge in an Assize Court, or a Chairman of Quarter Sessions.

The above considerations are suggested as specimens which might be protracted to an indefinite length, and exemplified by instances drawn from the whole region of Spiritual Judicature. But brief as they are, they are amply sufficient to show that where two jurisdictions are required, and one only is possessed, there must needs be a deadlock. The sword of Constantine is present, that of Peter absent.

3. Suggested remedies.

The real question then to be solved is how to compose a Court invested at once with both civil and spiritual jurisdictions. This primary proposition few persons will, I presume, care to deny, however widely they may differ as to the means for securing the object in view. One thing appears to me at least clear, that this desired result can be only obtained by direct reversal of the present system. That is to say, that the tribunal for hearing Ecclesiastical cases in final resort should not be a Court of lay persons assisted by spiritual assessors, but a Court of spiritual persons assisted by lay assessors. If such a Court should be appointed by the Crown, it would be thus invested with Civil external coactive jurisdiction, spiritual jurisdiction being inherent in the spiritual persons themselves who compose the Court. This seems the only practicable method by which a combined jurisdiction necessary for the purpose before us could be secured.

It cannot be too earnestly impressed on the reader's notice that the appointment of spiritual persons as above suggested to compose the Court of Final Appeal, was the intention of our legislators and statesmen when appeals were withdrawn from Rome. By 25 Henry VIII. c. 19, the very same Act which constituted the Court of Delegates, which is the parent of our present Judicial Committee, a commission of thirty-two persons was inaugurated for revising ecclesiastical law. The result of its labours was the "*Reformatio Legum.*" It was there recommended that appeals from the Archbishop's Court should be carried if "a grave cause" to a Provincial Synod, if not "grave" to "three or four bishops." This last provision without doubt had reference to the delegates appointed by the same Act which inaugurated the Commission that made this recommendation.

Vid. sup. p. 86.

We thus have contemporaneous testimony to the fact that the delegates to be appointed by the Crown should be spiritual persons. And this agrees with the proposition above suggested. It is no new idea, but one that prevailed at the origin of our present system, though it has of late been entirely overlooked and disregarded. For it cannot be too often repeated or too carefully remembered that the present system is in direct contravention of our Reformers' intentions, that it is the result of a pure legislative accident—as confessed by Lord Brougham himself, the chief author of the Judicial Committee's jurisdiction—and of most unsuccessful recent endeavours to patch up the original blunder.

If the great principle were carefully maintained, that the Court should combine in itself both spiritual and civil jurisdictions, the details for carrying out the purpose would really be of minor importance.

4. In an ordinary Cause.

As aforesaid, it was suggested in the *Reformatio Legum*, which must be presumed to represent the intentions of our legislators when appeals were transferred from Rome to the Crown, that supposing the cause not to be "a grave one" the matter should be referred to "three or four bishops." The principle here maintained is that a spiritual question should be referred in final resort to spiritual authority.

In accordance with this suggestion, when a case is referred to the Crown it might now select and appoint a certain number of bishops with lay assessors and perhaps some divines.

It might be also matter for consideration whether at the commencement of new Convocations a Royal Letter of Business might not be addressed to them, directing them to elect a body of bishops (with perhaps divines added) from which the Crown might select members to form such Appeal Courts.

If such a course were adopted for the Constitution of a Final Court of Ecclesiastical Appeal, such persons as are jealous for the maintenance of the supremacy of the Crown need have no fear of its diminution. But on the contrary they may discover in it an assertion of that supremacy which the present system entirely ignores; as the fiction of the recommendations of sentences to the Crown by the Judicial Committee is a mere shadow. The present Court is the creature of Parliament. In reality it pronounces its own judgments, and by its creation directly invades the Royal Supremacy, which was formerly maintained by the appointment of delegates under the provision of 25 Hen. VIII. 19.

Such a Court as that above suggested would be constituted by direct appointment of the Sovereign, and would thus really main-

tain that Royal supremacy for which a Parliamentary supremacy has been substituted. But the former is far more desirable and defensible. For by the reception of Holy Communion at their Coronation there is a guarantee given that our Sovereigns must be members of the Church of England, while Parliament is composed in part not only of such persons as are not members of the Church, but of such as are not even Christians.

And further, if a Final Court of Appeal in Ecclesiastical cases was constituted on the lines laid down in this Chapter, the members of the Court would not only receive external coactive jurisdiction delegated by the Crown, but would be such as had received the sanction of the voice of the Church, and enjoyed her confidence, and thus the two needful jurisdictions would be secured and combined.

5. In "a grave cause."

Yet even if such a Court as above suggested were established it might be a matter for consideration whether the Crown, instead of referring to that tribunal in "a grave cause," might not refer the question to a Provincial Synod as suggested by the "Reformatio Legum" contemporaneously with the transfer of appeals to the Crown.

Should the Crown take this course in the case of a "grave cause," that is one in which an important question of doctrine is raised on appeal from an Archbishop's Court, it cannot, I think, be doubted by any one at all versed in ecclesiastical history, that it would be in strict accordance with those Apostolical and primitive principles on which the English Church is founded, to refer from a Metropolitan Bishop to his Provincial Synod, as being the Spiritual authority next in gradation above himself. And Apostolical principles are here appealed to in contradistinction to Patriarchal principles on the one hand, and Hildebrandine principles on the other. For though the Church of England has established no individual Spiritual authority superior to that of a Metropolitan, who is the *Primus inter pares* among the Apostolical band of his Provincial Bishops, and the representative of such primacy as S. James, the first Bishop of Jerusalem, exercised in that primæval See of the Christian Church, and is the inheritor of such authority as was conceded to that chief Apostle in the first Council of which sacred history gives any detailed account—the Council of Jerusalem, the true pattern for future Synods, precisely described and providentially handed down in the pages of Holy Writ itself for imitation in succeeding generations—yet still a Metropolitan's individual authority, in accordance with the unalterable principles of the Church in every age, is of course subordinate to that of his Provincial Synod.

Mosheim Eccl. Hist. App. I. vol. vi. pp. 59, seq.

Acts xv. 6—29.

In the case, then, of an Appeal here from a Metropolitan's Court, if the cause were a "grave" one, such reference would seem to be in strict accordance with primitive examples.

In either case, whether a cause not being "grave" was tried before delegated Bishops, or being "grave" before a Provincial Synod, if the accused party were condemned the judgment of the tribunal should be signified to Chancery for enforcing the secular parts of the sentence, such as costs and the like, and to the Bishop of the Diocese in which the accused resided for enforcing its spiritual elements.

No one can, of course, be blind to an objection which may here be taken to the course laid down in the "*Reformatio Legum.*" It is this—that as there are two Provincial Synods in England, the reference on a matter of faith in a "grave cause" might be either to Canterbury or York, according to the locality in which the question at issue first arose, and that so two different bodies might be consulted in final Appeals, and that unity might be thus imperilled. But upon consideration this objection does not appear overwhelming. For it may be answered, first, that such resort to Provincial Synods is of the very highest antiquity, and can boast of the most venerable lineage. Secondly, that the Synods of Canterbury and York have time out of mind acted in the most loving concord, and that to their harmonious agreement and conjoined authority may be referred our whole Ecclesiastical fabric. The rejection of the Papal supremacy, the Articles, Canons, and the Liturgy of the English Church, these are the great abiding monuments consecrated to the regards of this nation by the undivided concord and united labours of our Provincial Synods or Convocations. And in the case of a "grave" question touching the common faith being submitted to either of those Synods by the Crown, it is but reasonable to suppose that joint consultation would in some way be taken before a reply was returned.

Œc. Conc. Constant. Can. 6.

Conc. M. B. iii. 769. Ibid. iii. 782. Card. Syn. l. 53. Conc. M. B. iv. 379. Ibid. iv. 428. Ibid. iv. 566. Syn. Ang. ii. 95, Nicholl's Pref. pp. x. xii.

The methods adopted for such joint consultation have been in past times various, but have contributed to the happiest results. Sometimes our Provincial Synods have been united into one body; sometimes drafts of instruments have been transmitted from one to the other, and thus have been ratified by both; sometimes proxies have been sent from one to the other with power to act for the Synod deputing them; and sometimes joint committees for the settlement of business have been appointed,—a course which in our own time has been attended with very beneficial effects, as all those engaged would be willing to testify. Such considerations and such precedents go far to take the edge off the objection above suggested, if they do not prevail entirely to remove it.

Conc. M. B. i. 325. Ibid. i. 363. Wake's App. 240. Conc. M. B. iv. 568.

For such an appeal as that now under consideration, there is this recommendation, that the machinery is always ready. There is no necessity for constituting any new body; the two Convocations, in their present condition more venerable from their antiquity than any other institution of which this land can boast, being in existence. And surely, for the purpose of obtaining evidence of the faith of the Church of England on any particular point under discussion, no authority can be reasonably considered more unimpeachable, or ought to be held more conclusive than theirs. At any rate, the nation has hitherto been willing, and at this hour is content, to accept the National Confession of Faith,—the Articles of Religion,—and the National Manual of Devotion,—the Book of Common Prayer,—as constructed and commended for adoption by their original authority. This fact no man of competent knowledge and of reasonable good faith will, on due consideration, pretend for one moment to deny, though perhaps by far the greater number of educated people have never even contemplated it.

As a nation we are by no means prone to investigation of causes, principles, and originals of what lies before us; we are mostly satisfied with effects and results. And if the conviction of the poet of Imperial Rome is well founded, that happiness consists in discovering the originals of things, then that certainty is an element of human felicity to which comparatively few among us even aspire. How many men receive with unwavering fidelity and proclaimed satisfaction the English Articles as an expression of National Faith, the English Prayer Book as the guide of public devotion—present possessions to them of undoubted value and of unquestioned authority—and yet never bestow a moment's thought on the original source whence these are derived, nor on the original authority which has commended them for acceptance. Yet it is to the authority of our Provincial Synods or Convocations that the original creation of those expressions of the National Faith and of that form of public worship can alone be referred. Nor indeed could it be rightly otherwise in the case of a Church like this, which, in imitation of Apostolic precedent and in strict accordance with primitive example, is one emphatically of Provincial organization.

Virg. Georg. ii. 490.

Card. Syn. i. 34, 53. Conc. Mag. Brit. iv. 566—568. Syn. Ang. ii. 95.

And so if the nation has hitherto been willing, and is now content, to concede generally so large an amount of authority to our Provincial Synods or Convocations as to adopt from their hands, and to accept under their original sanction, the formal Confession of the National Faith and the Common Manual of Public Devotion—then really it seems quite incomprehensible why there should be any backwardness to commit particularly to the same authority the duty of advising how a single point of doctrine raised on a special case should be ruled in a matter

exclusively affecting the faith and worship of the Church of England.

There is still a further matter for consideration which seems to commend the plan of referring to a Provincial Synod in the case of a point of disputed doctrine on appeal from the Archbishop's Court. Suppose a new heresy to be invented, and this is by no means an impossible supposition, in fact one inclines to the belief that it has been realized even in our own days, both on this and on the other side of the Atlantic. The voice of a Provincial Synod is, under such circumstances, and in accordance with the organization and principles of the English Church, the only voice which could speak with rightful authority. And the value under these circumstances of such a reference as that before mentioned appears indisputable.

Heath *v.* Burder, Eccl. Judg., pp. 224 seq. and Mormon Apostasy.

And, indeed, under the circumstances of our Provincial organization in the Church of England, no more satisfactory or unexceptionable authority in last resort for a Spiritual decision can be referred to than the Provincial Synod or Convocation of the Province in which the dispute arose. For, say what men will, in a matter of fundamental doctrine, no final decision will ever be generally accepted with contentment and satisfaction but that of the highest recognized Spiritual authority on questions of faith.

CONCLUSION.

In conclusion, it is desirable to advert to one or two matters suggested for general consideration by the subjects treated of in the foregoing pages.

(I.) One serious impediment in the way of obtaining an amendment in our present system of Ecclesiastical Appeals arises from a grave misapprehension. It is by many persons quite erroneously imagined that such grievances and anomalies as attend the existence and action of the English Court of Final Appeal in Ecclesiastical Causes are inseparable from the condition of a Church established by law. It is supposed that if the State chooses to adopt any particular form of religion, it will of necessity reserve to itself the power of deciding on disputed points connected with that religion in last resort. And this erroneous supposition has perhaps been not a little fortified by a suggestion which has been made by an author of repute, that if the greater authority is conceded to the State of deciding generally what shall be the established religion of the nation, the lesser authority of deciding particularly any single point of belief connected with the form of religion so selected, cannot with any reason be withheld. In fact, the argument shortly amounts to this, that it would be a contradiction to concede to the State authority to decide on the adoption of a whole system of faith and morals, and at the same time to deny it authority to decide on any separate part of that system in detail.

But, upon consideration, such reasoning appears wholly fallacious. When the State selects for the instruction and guidance of its subjects, in matters beyond all others of the highest importance, a system of religion which existed long before the State itself had any being, it must fairly be presumed that the principles of that religion are the attractions which have secured for it this special preference and regard. And the fundamental principles of the Christian religion are, that it is a system of Divine, not of earthly origin; that the Church is a kingdom "not of this world," but endowed by her Lord with gifts from above. Consequently, she never can be presumed, from the very elements of her original foundation and continuing existence, to be, I will not say willing to accept, but to be capable of accepting judgments external to herself in Spiritual matters or in regard to Divine Truth. It is thus manifest, when the State adopts the Christian Church as the established form of religion,

that it must, if any lasting alliance is to be maintained, leave the Church, in words which are consecrated over and over again in the records of our own country, "free in her judgments." In truth, to pursue any other course is to assault the fundamental principles of her inmost being; those very principles which it must fairly be presumed have commended her to the adoption of the State as the best engine for the instruction and improvement of its subjects.

Though it thus appears quite impossible, from such considerations, that the Church of Christ can ever willingly consent permanently to be subject to any authority external to herself in the decision of Spiritual questions, yet it is doubtless not only quite possible, but quite necessary in some cases, that authority in matters of religion should reside in the State itself. It must for instance have been so where the Church and the State were identical, as until lately in modern Rome. It must again be so in such a case as that of ancient Rome, where polytheism was adopted as the State religion, where the worship of many gods was established, and where the multiplied objects of adoration were but the impersonations of the heroic virtues, or, alas! of the debasing vices of humanity. These were severally nothing more or less than the reflexes of popular opinion, which could only properly be expressed under the control of a department of the State in such a case justly claiming to direct all the national manifestations of public devotion, with their accompanying rites and ceremonies.

But it must be clear to the most superficial observer that this cannot be so in the case of any religion whatsoever which is founded in the belief of a revelation or of a mission from above, when that religion is connected with a State which neither claims nor even pretends to any such authority itself. Then such concessions cannot be made to any secular authority, be it what it may, confessedly deriving its existence from human arrangement and human will only. And if this is generally true, most emphatically is it so in the case of the Christian Church, for reasons which have been above detailed at length in these pages. Nor, as a fact, as has been before shown, does the secular power in any Christian country except our own—and, indeed, from this exception we must exclude Scotland—interfere with judgments purely spiritual. To adopt the words of Milton in reference to this subject,—

> "To know
> Both Spiritual power and Civil—what each means,
> What severs each,"—

This is a grade of knowledge attained by all civilized nations except England.

(II.) Another impediment in the way of arriving at a satisfactory arrangement of the matters above treated arises from the confusion which exists in many minds between the separate functions of Synods and Courts. The distinctions, which are really very plain in respect to this subject, are so commonly and so strangely overlooked, that one may hope to be pardoned for stating here a palpable truism, viz. that while it is, on the one hand, the duty of Synods to constitute Ecclesiastical law, and to define articles of Christian faith, it is the duty of Courts, on the other, merely to interpret law already made, to adopt definitions of faith already settled, and then to apply each to particular cases as they may arise. Courts neither enact laws nor define articles of faith; Synods rightly do both. And one ventures to hope that some circumstances of the present times will plead sufficient apology for a public statement of such notorious, simple, and incontrovertible facts.

There is another distinction between Synods and Courts which is very insufficiently apprehended, and the disregard of it has introduced much confusion. Synods sometimes try opinions only, without reference to particular persons; Courts always try persons. Judgments of Synods are sometimes directed against the opinions of a person who may reside outside their territorial jurisdiction, or who may have long since passed out of the world; as, for instance, was the case with the tenets of Origen, which were condemned by the Fifth Œcumenical Council three centuries after their author's death. The judgment of a Court, on the other hand, is necessarily directed against a particular person, and is confined to a particular territorial jurisdiction. In the one case the opinion, in the other the person, is submitted to the judgment of the tribunal. In the one case the opinion is charged as the offender; in the other the man.

It is needless to follow into detail the distinctions hence arising, or the many differences of practice and procedure in synodical and in curial trials necessarily resulting. It may suffice here to point out that an opinion can neither retract nor explain itself. It challenges the judgment of a Synod for conviction as an offender or for acquittal as innocent in the very words in which it is expressed. On the other hand, a person may retract or explain. Both courses are open, and either may have its effects on the judgment of a Court. A Court's duty is to discharge a man, however blameworthy his opinion, if it is retracted; a Synod's, to condemn a false opinion, without direct reference to the man. These simple principles, confirmed by the experience and practice of past ages, appear very plain when stated, but somehow or other they have strangely faded out of sight in these later times; and from inattention to them some strange notions have

become current, and some very odd propositions have been of late commended to public regards.

(III.) Of the unpopular character in this day of many of the principles above maintained, no one is more keenly sensible than the writer of the foregoing pages. No one is more fully alive to the fact that in some quarters they are the objects of silent, supercilious contempt, in others, of expressed and open scorn. Still, they have been very widely held in ages which were certainly not less conspicuous than the present for intellectual power, and by men who, to say the least, were behind none of this generation in vigour, expanse, and precision of thought. If those principles are false, in holding them at least one errs in company of which no man need be ashamed. But if they are true, however distasteful they may be, it never can be out of place to assert them. Indeed, the less they are regarded, the greater is the need for commending them to attention. It may be, perhaps it is, lost labour to do so. Still, however inefficiently performed, however ineffectual it may prove, it has been a labour of love, to endeavour to maintain the inalienable right of this Church of England to define her own doctrines and to guard her own faith. And the results of that labour are now, in lowliest humility, commended to the favour of the Great Head of the Church, who has assured us that His kingdom "is not of this world," meanwhile leaving to us the Divine command which was placed in the forefront of this treatise:—

"Reddite ergo quæ sunt Cæsaris Cæsari, et quæ sunt Dei Deo."

APPENDICES.

Appendix A.

Containing (1) the Judgments of the Lords Justices of Appeal and of the Queen's Bench Division touching the Public Worship Regulation Act; (2) all the Judgments in Ecclesiastical Cases (except the Owston Ferry Tombstone Case) delivered by the Judicial Committee of the Privy Council since those published under the sanction of Archbishop Tait of Canterbury, when Bishop of London, in 1865; (3) the Judgment of the Rolls Court in the Colenso Case.

The Judgments of the Judicial Committee of the Privy Council are printed *verbatim* from the Official Copies.

Appendix B.

Containing (1) all the Acts of Parliament relating to Final Ecclesiastical Appeals; (2) the Order in Council, November 28th, 1876, regulating the attendance of Episcopal Assessors in Ecclesiastical Appeals as provided by 39 and 40 Vict., chap. 59, sect. 14, 1876.

APPENDIX A.—JUDGMENTS.

JUDGMENT OF THE COURT OF APPEAL

IN THE CASES, HEARD TOGETHER, OF

THE REV. T. P. DALE AND THE REV. R. W. ENRAGHT
v. LORD PENZANCE AND OTHERS.

Delivered at Lincoln's Inn, January 15, 1881.

PRESENT

THE LORDS JUSTICES JAMES, BRETT, AND COTTON.

LORD JUSTICE JAMES: The main question, or, at least, that which has been treated as the main question in this matter, is whether the Inhibition granted by the Dean of Arches in Mr. Dale's case and the similar Inhibition in Mr. Enraght's case, can be enforced by process of significavit and then by writ *de contumace capiendo*.

Upon the first question, the question of the jurisdiction of the Dean of Arches to pronounce the Inhibition, and the consequences of it, I must confess that I have not been from the first able to entertain any real doubt that, by the Public Worship Regulation Act, or in compliance with its provisions, Lord Penzance was appointed by the joint appointment of the Archbishop of Canterbury and the Archbishop of York to be a Judge of the Provincial Court of the one and a Judge of the Provincial Court of the other. A good deal has been said to us as to what was the effect of the appointment in the first instance, but, according to my view of the case, it is rather a matter of speculative history, and not very material or very relevant to the question that we have really to consider. My own opinion is that, if it were at all relevant, by the very words of the Act of Parliament, the judge appointed was not appointed a distinct judge, as constituting or making a distinct or new tribunal, but that he was a judge of the Arches Court of Canterbury, and that he was a judge of the Chancellor's Court of York—an additional judge to the then existing judges—with a right of succession to the then existing offices, and that his Court was a Divisional Court of the old Court of Arches, in the case of the Province of Canterbury. But it does not seem to me to be very material, because the Act goes on to say that, upon the vacancy of the office, which was then filled by Sir Robert Phillimore, the judge thereupon appointed was to become Dean of Arches. Upon that, it appears to me to be not a matter of opinion, but a matter of what the Act says, namely, that Lord Penzance was to be Dean of Arches, and that he became the lawful successor of a long roll of eminent men who have filled the office from time immemorial of Official Principal of the Archbishop of Canterbury. Upon his succeeding to that office, then, his character, whatever it was, whether as a distinct judge, or an additional or extra judge, as such judge became merged and absorbed in his office as Dean of Arches, and the Court which he was authorized to hold before—whether it was an extra Court, or a divisional Court, or an independent Court, or a separate Court, whatever it

was, became absolutely merged and absorbed in the old traditional original Court of Arches. By way of making this quite clear, the Act of Parliament goes on to say, that after he succeeds to the office, all proceedings thereafter to be taken before him "shall be deemed to be taken in the Arches Court." I, in obedience to the Act of Parliament, do accordingly deem them to have been proceedings in the Arches Court; I am obliged to say they are proceedings in the Arches Court. They are proceedings, therefore, by the Arches Court, and the Monition pronounced in this case, and the Inhibition which followed, were therefore a Monition by the Arches Court and an Inhibition by the Arches Court. That being so, it seems to me to follow, as a plain matter of course, that the Monition of the Arches Court and the Inhibition of the Arches Court would be a Monition and an Inhibition, with all the incidents and consequences of any other lawful order of the Court of Arches. One of these consequences, and one of these incidents, was that a lawful order of the Court of Arches was to be enforced by significavit, upon which significavit a writ *de contumace capiendo* was to be issued. That seems to me to follow as a matter of course, unless there be something in the Act of Parliament to deprive those orders of their ordinary legal consequences. Now, with regard to the Monition, it possibly may be argued, it is not necessary for the purpose of to-day to consider whether it could be argued effectually, that obedience to a Monition is to be enforced only by an Inhibition. I say it may be argued; I, myself, think that it may be a point of very grave doubt whether the words "may be or shall be enforced by Inhibition" mean shall be enforced by an Inhibition, and in no other manner. The Act of Parliament does not go on to say how the Inhibition is to be enforced, and therefore it follows, as it seems to me, of necessity that the Inhibition is left to be enforced by the ordinary rules of law applicable to Inhibitions of the Court of Arches, which, as I say, this was. Then it is said that the Act of Parliament has provided a mode for enforcing the Inhibition, viz., that if the Inhibition lasts for three years, and obedience is not given within that period, then the living is to become void. But that is not an enforcement of the Inhibition—it has nothing to do really with enforcing obedience or disobedience to the Inhibition. Avoidance of the living is the result of default in making submission and undertaking to comply with the Monition. That is the cause which causes the avoidance of the living, but the Inhibition remains the same and would not be enforced by the avoidance at the end of the three years. The Inhibition would be enforced during the three years, and after the three years if obedience were not given, because it would apply not only during that time, but would apply afterwards with regard to the whole of the diocese as the result of disobedience. That being so, it appears to me that the Inhibition is an Inhibition with its ordinary meaning and ordinary legal consequences; that there should be the process of coercion which has been resorted to in this case. A great deal was said about this being a new jurisdiction, and a new procedure. According to my view of the case that is really again not material, because, if a new jurisdiction is given to an existing Court, that is to say, a jurisdiction to deal with some matters, or to deal with them with additional powers, or to deal in a different mode with different procedure if that power be so given—it seems to me that where it is given to a well-known Court, with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressed or plainly implied, be given to that Court to be exercised according to its general inherent powers of dealing with

the matters which are within its cognizance. But I am satisfied that in this case no new jurisdiction was given to the Court, assuming it, as I have done, to be the Court of Arches. The Court of Arches always had jurisdiction to deal with these matters; it always had jurisdiction to deal with the same persons. The mode of bringing the matter into the Court, and the mode of dealing with the matter when it is in the Court, are all matters of procedure and process, and not, according to my view, matters of jurisdiction. That seems to me to dispose of the objection to the jurisdiction of Lord Penzance, so far as regards the case of Mr. Dale. There is another point which has arisen upon the appeal of Mr. Enraght—that is, whether the Inhibition itself is not in excess of jurisdiction by reason of the alleged departure from the words of the Monition, and there, it seems to me, there was more ground for doubt, and for the argument that has been addressed to us. In the Monition certain vestments are ordered not to be worn; but the Monition, in accordance with the well-established and reasonable practice of the Ecclesiastical Court, goes on to say that you are not only to discontinue certain things, but you are not to do other things of the like kind—that is to say, you are to abstain from the like practices. Those words were put in in order to prevent colourable evasions, which could easily be resorted to if some such addition was not made to the sentence. Whether the Monition with those words has been violated is, it seems to me, a question of fact, in every case to be tried by the Bishop or the Judge who has issued the Monition. It is a question of fact which he has got to determine whether the person who is charged with disobeying the Monition has disobeyed, either in regard to the specific articles mentioned, or in regard to other things coming within the clause at the end of the Monition forbidding like matters. Now, whether the use of a stole in this case is "a like matter," fairly within the meaning of the Monition is, it seems to me, a question, not of jurisdiction, but of fact, upon which the proper judge of the facts has to determine. It seems to me to be very essential that we, who are sitting merely as a Court of Prohibition, should be very careful indeed, that we do not attempt to draw within our net a jurisdiction by way of appeal by saying that, as a matter of fact, the use of the stole was a breach of the Monition, being a matter of a like character. It was suggested that there was no appeal from that, but I should not like to say that there was not. My own opinion probably is, there would be an appeal from it, but, however that be, it is a matter with which we have not to do here. Either there is an appeal or there is not an appeal. If there is an appeal, that is the proper remedy. If there is not an appeal that is a *casus omissus* in the Act of Parliament, and we cannot enlarge our jurisdiction as a Court of Prohibition, because there is not sufficient and proper machinery to deal with it on appeal, where it clearly is, according to my view, a question of appeal, and a question of appeal only, that is, as to whether the conclusion in point of fact has been rightly arrived at, and whether the judicial discretion has been properly exercised. That seems to me to dispose of that objection in Mr. Enraght's case, and so far as I am concerned the defection to the jurisdiction in Mr. Dale's case has been already disposed of. But then there remains to be disposed of the other question, which, so far as the Appellants are concerned, seems to be the real substantial question in their case, viz. whether they are entitled to be discharged from custody, and whether Mr. Enraght is entitled to the writ of *habeas corpus* by reason of there being a miscarriage in the mode in which the writ of capias has been dealt with. Now upon this point

I find myself unable to concur in the Judgment of the Queen's Bench Division. The Judges of that division all expressed their opinion that if it were not for the Act for regulating the procedure of the Petty Bag Office the objection must prevail, and I think they were right, if I may say so, I think they were well founded in that conclusion, that having regard to the words of the statute of 5th Elizabeth, chap. 23, and to the decisions of many very eminent Judges upon that statute, it was not a matter of form—not a matter merely, as it is called, directory—a thing which not being done or being done was equally valid, but that it was a matter of substance that the writ which was issued from the Court of Chancery from the Petty Bag Office, should be brought into the Queen's Bench and opened there, in order that the judicial mind might, if necessary, be addressed to the significavit, and to the writ issued upon the significavit to see whether it was such a writ as the Court of Queen's Bench would take upon itself to execute. They were not, as has been said, to issue process as mere instruments or conduit pipes, but they were to exercise their own judgment judicially as Judges, and the mode in which this was to be done was by its being brought into Court and opened in Court—not, I presume, in every case read by the Judges or read to them, but it would be the duty of the officer reading it immediately to take the opinion of the Judges if he thought there was anything upon the writ which required to be considered, or which might be of use to the Court, or which might cause the Court not to adopt it or be instrumental in enforcing it. Another reason might be that when the Court was sitting the Defendant would have an opportunity of applying at once to the Court for relief in case there should be any miscarriage or error in the proceedings commenced against him. But whatever might be the reasons, whether good or bad, those were the decisions of a succession of Judges upon the statute of Elizabeth. Then came the Act 53rd George III. cap. 127, which in effect and all but in words re-enacts the part of the statute of Elizabeth. Although the purpose for which the statute of Elizabeth is said to have been passed was the giving greater security for the enforcement of the writ *de excommunicato capiendo*, the Act of 53rd George III. cap. 127, in providing that there should be a writ *de contumace capiendo* instead of *de excommunicato capiendo*, enacted that the substituted writ should be obtained and dealt with in exactly the same manner as the old writ under 5th Elizabeth, cap. 23, was. We are to read the statute not only as if those words in the statute of Elizabeth were transcribed into the statute of George III., but we start with this, that where words of an old statute are either transcribed into, or by reference made part of the new statute it is, according to my opinion, a rule of construction that this is always done with the object and intent of giving to those words any legal interpretation which has been put upon them by Courts of Law, so that it is convenient that the same words should, either by transcription or reference, be used in order that everything that had been settled before should remain settled without fresh litigation. According to my view it was an essential part of the proceedings as to the significavit, that the writ should be brought into the Court of Queen's Bench while the Judges were present sitting there, and given to the Petty Bag Office at the time when the Petty Bag Office Act was passed. I am of opinion that the Act relating to the proceedings of the Petty Bag Office did not certainly in terms, nor, as it appears to me, by any plain implication or any implication at all, alter that which was required to be done in and by the Court of Queen's Bench. Everything that was to be done in and by the Petty Bag Office is

altered. The writ may be issued out of Term, the writ may be returnable out of Term, because these are things which are to be done in the Petty Bag Office. But as it appears to me there is nothing in the Petty Bag Office Act which by implication interferes with that which was to be done by the officers of the Court of Queen's Bench in the presence of the Judges of that Court. Everything, as was pointed out by Mr. Charles in his argument, in the Petty Bag Office Act, can have effect given to it, and yet still everything that was required to be done in the Court of Queen's Bench could be done exactly in the same way, and would have the same effect, without its being in any way inconsistent with the provisions of the Petty Bag Office Act. It may seem to be a very idle thing to attach weight to whether the writ is to be opened in Court, or whether it is to be opened in the Crown Office in the Temple; but it may perhaps not be more idle than the whole question before us. By law a man is obliged to wear a particular vestment, and he is obliged to do it. By law the writ ought to be opened in a particular place and before particular persons. If one law is to be obeyed, the other law is to be obeyed also; and I am of opinion that the writ was defectively issued from the Court of Queen's Bench after it had left the Petty Bag Office, and that being so, that Mr. Dale is entitled to be discharged from that writ, that having been improperly issued, and the consequence will follow with respect to Mr. Enraght, that he will be entitled to his rule for a *habeas corpus* in order that he may also be discharged.

LORD JUSTICE BRETT: Under ordinary circumstances, in such a case as this, one would have preferred to carefully prepare the Judgment which one had to deliver, but this being a case in which the liberty of the subject is concerned, it ought to receive the immediate decision of the Court if possible.

We have now for five days had our minds directed to this case, and have been assisted by arguments which, I beg leave to say, have been as careful and as talented as ever could have been brought before the Court, in order to enable it to come to a conclusion. I, therefore, think that we ought, to the best of our ability, to give an immediate Judgment.

Now the matters which are brought before us are brought under two distinct heads; the one being whether a prohibition ought to go, and the other that, supposing there has been no excess of jurisdiction at all, so that no prohibition ought to go, whether we ought not to order the release of one gentleman, or the release of both, upon the motion for bringing them up upon *habeas corpus*, on the ground of there having been an irregularity in the way in which the jurisdiction of the Court has been exercised. Now with regard to the prohibition the question is whether there has been an excess of jurisdiction by reason of Lord Penzance having signified to the Court of Chancery, and thereby having obtained the writ which has been so much discussed. It is alleged that there was excess of jurisdiction in that respect, because it is said that in cases which are conducted under the statute of the 37th and 38th Vict., the Judge could in no case whatever signify the matter into the Court of Chancery so as to obtain this writ—it was said he could not do so in any case whatever, but it was further urged that even if he could do it in some cases and by some means, there was an excess of jurisdiction in his doing so in the present case, because it was said that he had done so in respect of a Monition and an Inhibition, which had been so drawn up that they were void, and that they being void, therefore, he exceeded his jurisdic-

tion in signifying the matter into the Court of Chancery upon void documents. Many reasons were given in order to argue the question whether he has the power of signifying in any case, but with regard to the question of whether he could signify in the present case the matter depended upon this, whether he was bound to show upon the face of the Monition, and upon the face of the Inhibition, many things which were said to be necessary in order to found his jurisdiction. I think we were all of opinion from the beginning that he was not bound to show upon the face of these documents the grounds of his jurisdiction in the way in which it was alleged. I should have thought so upon the ground which I shall have presently to discuss, namely, that the Court in which he was sitting, and the Court of which he was the Judge, is the Court of Arches, the old Court of Arches, and no new Court at all; and that the Court of Arches, although it is a Court with a limited jurisdiction, yet is not a Court of inferior jurisdiction, but is for such a purpose as that a Court of superior jurisdiction, and is not bound to show upon the face of its documents that superior jurisdiction. But I also think even if it were not so, that these documents were drawn up in proper form, and cannot be objected to upon the grounds that they are drawn up in the form given in the rules and orders, which have been made, and made by virtue of the statute. I quite agree that in some cases, rules and orders which are drawn up by Judges may not form part of the statute; but the question is whether the rules and orders which were authorized by this Act did become, when they were made, a substantial part of the statute. I am of opinion that they did, and upon this ground: that not only is the authority given to certain persons by statute to draw the rules, but these rules and orders are to be laid before Parliament for a certain time, and, if not objected to, are then to be binding. Wherever that stipulation is introduced into an Act of Parliament, it seems to me that the rules and orders, if not objected to by Parliament, become really part of the statute. But then it was said that though the rules and orders might be part of the statute the forms were not. In my opinion the forms are part of the rules and orders; they are referred to in the rules and orders, and the mere fact of their being put into a schedule and referred to in the rules and orders is a mere question of drafting. The forms are, therefore, part of the rules and orders, the rules and orders are part of the statute; and these documents have therefore followed the statutory form: and even, therefore, if they might otherwise be insufficient, they are made sufficient by virtue of the statute.

Now the main question, and really the substantial question, and the one upon which Mr. Charles exercised all his great talent, is the question whether this is, or is not, the old Court of Arches. Now, it is argued that not only it is not the old Court of Arches, but it is a new Court which is not an Ecclesiastical Court at all. If it is the Court of Arches, why, then the proposition fails at once. I confess that, after having listened with all the attention I could, and after having tried to sift and understand the argument, it seems to me as clear as anything that ever was propounded in a Court that this is the old Court of Arches, and nothing but the old Court of Arches; and when the matter is carefully examined no reasonable person could, if they would bring their minds to examine it, suppose that there had been a new Court at all, whether ecclesiastical or lay, established by this Act of Parliament. From the time of Lord Coke there had been two Provincial Courts; there had been the Provincial Court of the Province of Canterbury, and the Provincial Court of the Province of York, both of them bearing the

names of Provincial Courts; also, they each had another name—the Provincial Court of the Province of Canterbury was known as the Court of Arches, and the Provincial Court of the Province of York was known as the Chancellor's Court of York. Each of them, therefore, had two names; but they had one of those two which belonged to each of them, and was a common name which would include both. So therefore, in ordinary language, anybody wishing to speak of the two Courts at the same time would naturally use the name which was common to both, and which would include both. No person in ordinary language, if he wished to speak of both the Courts at one time, would go through the unnecessary verbosity of saying the Court of Arches and the Provincial Court of York; but he would, if he wished to speak of them both, call them the Provincial Courts, which would include both.

Now, how is an Act of Parliament to be construed? It is to be construed according to the ordinary mode of using the English language, unless it clearly appears to the contrary. Therefore, in the first mention you have of this matter in the Act, the person who drew the Act, trying to speak of both Courts, has used the ordinary mode of expressing himself in English, if he wanted to describe those Courts. If this were a new court it would hardly have been called a Provincial Court at all, a name would have been given to it; but, at all events, it must have been called a Provincial Court, and would not have been called the Provincial Court, which necessarily refers to something which existed before. So that you have this, that the first time that they are mentioned here is that, the Archbishop of Canterbury and the Archbishop of York may appoint a certain person to be a judge of what? Of the Provincial Courts of Canterbury and York. That seems to me to make him a Judge of both Provincial Courts, that is to say, of the Provincial Court of Canterbury and the Provincial Court of York, in other words, of the Court of Arches and of the Chancellor's Court of York. But there is more than that: Those Courts, the Provincial Courts of Canterbury and York had existed for centuries; they were Courts with a judge appointed by the Archbishops respectively; those Courts had certain officers; those Courts had certain seals; and those Courts dealt with certain subjects. The day after this Act of Parliament was passed, it seems to me impossible to doubt but that the same subject matters would be heard, that the same officers would be the officers to carry out the decision of the judge, the same seal would be used, and there is nothing in this statute from the beginning to the end which can be suggested as instituting any Court at all, unless you can say that by the mere fact of enabling the Archbishops to appoint a particular person, that makes a new Court. Not only therefore does the name seem to signify the old Court, but the fact of there being no new officers appointed, no new seal appointed, no new Court named, and, above all, the fact that it is precisely the same persons who are to appoint the judge, namely, the Archbishops, though they must do it by appointing the same person to both Courts, seems to me conclusively to show that by the statute itself it was intended that the Judge should be the Judge of the old Courts, which are referred to as the Provincial Courts of Canterbury and York. But then many objections were taken to that view, and it was said that it must be a new Court because the qualification of the Judge was different.

Now I cannot conceive such an argument as that—that because the qualification of the person to be appointed is altered, therefore the Court must be

a new one. Then it was said that it was a new Court because the procedure is a new procedure. That argument was used as to the question of whether it is a new Court or not; but how can an enactment, which merely enacts a new procedure as to matters which were before within the jurisdiction of the Court, make that a new Court. It is obvious that it does not.

But then it was said, and I thought that was the strongest part of the argument, that it was a new Court, because a new jurisdiction was given to it, namely, that the jurisdiction of the old Court of Arches, that is the one with which we may principally deal, was merely an appellate jurisdiction, and that this enactment gives it a jurisdiction of first instance instead of an appellate jurisdiction. That seemed to me to be formidable. It was said, further, that, even if you consider that with letters of request, the Court before had an original jurisdiction, yet inasmuch as you gave the Court power now to act without letters of request, that is a new jurisdiction; but I think the answer was given during the course of the argument that the jurisdiction of the Court to deal with ecclesiastical offences existed quite independently of the letters of request, that the letters of request were, after all, only a mode of procedure, and that the Court had power to deal with all the matters with which it has dealt now by reason of its inherent jurisdiction, and of its original jurisdiction, and that the mere fact of taking away the necessity of letters of request is a mere alteration of procedure, and is not the giving of a new jurisdiction. But then it was said that we ought to collate from the terms of the statute itself, that it was intended to give a new jurisdiction, and much reliance was placed by Mr. Charles upon the words of the 7th Section which say, "That all proceedings hereafter taken before the Judge in relation to matters arising within the Province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury," and so with respect to the Court. It was urged that where the statute says that you are to deem that certain things shall be, it assumes that in point of fact they are not so, and that, therefore, those who drew this statute were of opinion that this Court was in reality not the Court of Arches, but that matters which were brought before it under this statute were to be "deemed to be in the Court of Arches." But I am of the opinion that the true interpretation of these words was the interpretation suggested by the Attorney-General, and that all they mean is this—that inasmuch as the Court may be held neither within the Province of Canterbury nor within the Province of York, wherever it is held, all matters which came before it, which arise within the Province of Canterbury, are to be considered as in the Court of Arches, whereas all matters which came before it, which originated within the Province of York, are to be considered as within the Provincial Court of York. Therefore, nothing can be gained from that construction.

It was said it was obvious that this must be a new Court, even now, because it was said that it must have been a new Court before the vacancy, and that, therefore, it must be a new Court after the vacancy. Now, in the first place, supposing the first of those propositions were true, it does not seem to me that the second is a consequence from it. I do not think it true to say that, even if it were a new Court, or that there was a new jurisdiction after the appointment of the Judge and before the vacancy, that, therefore, it would follow that it was a new Court, or that there was a new jurisdiction after; but it seems clear to me, that it was neither a new Court or a new jurisdiction before the vacancy. I cannot accede to the view that power to appoint a new Judge, or that power to appoint an additional Judge, should

alter the Court or alter the jurisdiction. It only gives power to appoint an additional Judge to a Court in order that he may exercise all the jurisdiction of that Court, and it seems to me that the moment the new Judge was appointed, even before the vacancy, all that was done was that he was made an additional Judge of the Provincial Courts of Canterbury and York; and that it is true that his power of acting within that Court was only confined to certain matters over which that Court had jurisdiction, but that nevertheless he was made a Judge, and an additional Judge, of the Court for the purpose of performing certain duties.

But then it was said that even supposing that this was the Court of Arches and the Court of the Province of York, yet, nevertheless, a new jurisdiction was given within that Court, and it was said that the enactment of this statute showed that it was a new jurisdiction, because the Court was enabled to do things which it had not been enabled to do before—namely, amongst others, that in respect of disobedience to a Monition the Court was called upon or had power to direct the Inhibition which is mentioned in the 13th section. The proposition, therefore, is that wherever in the existing Court the Court is enabled to do something which it could not do before that, that is a new jurisdiction. In my opinion, that is an incorrect proposition. If the Court is dealing with matters which were before within its jurisdiction, but is only enabled to deal with them in a new way, it seems to me to be not a new jurisdiction, but only a new procedure. Therefore I am of opinion that all the stipulations in this statute are mere stipulations as to procedure, and not as to jurisdiction at all.

Now, then, arises the further question, namely, supposing that they are mere procedure, yet it is said that they are an exclusive procedure with regard to the matters which are contained in this statute, that they are a new procedure which is made to take the place of all the old procedure, and therefore, by implication, to get rid of the power of the Court to deal with any matter according to its old procedure and to oblige it to follow this new one. I do not doubt, but that the legislature would have power to do that if it thought it right to substitute one person for another; but the question is whether it has so done, and inasmuch as all the enactments with regard to the procedure here are affirmative, I should say that it can only substitute the new procedure for the old, when it is made perfectly clear that it is so intended. With regard to the power of enforcing a Monition, which Monition is made under this statute, though such a Monition might formally have been enforced by other means, namely, that upon disobedience of it, the matter might have been signified into the Court of Chancery and the writ obtained, as far as my present opinion goes, I am of opinion that the 13th section here does clearly substitute the formal procedure contained in it in the place of the power of signifying the disobedience of that particular Monition. But that is not sufficient. It must show that not only must the Monition be enforced by this process, but that with regard to the Inhibition it has taken away—if it be disobeyed—the power of enforcing it in any way otherwise than is contained in this section. But then the defect there is that there seems to me to be no mode enacted here by which disobedience to the Inhibition, during the time it has to run, is to be enforced; there is no mode of enforcing obedience to it at all, unless it be the ordinary modes of the Court—that is, the formal Monition of the Court. Therefore, with regard to enforcing obedience to the Inhibition for the time it is running there is no substituted process at all; there is no new process substituted for an old one;

there is no process at all substituted for the old one; and it seems to me, therefore, to follow that, though, in my opinion, the Monition must be enforced by this Inhibition, yet that for disobedience to this Inhibition, the old process of the Court for enforcing any one of its orders exists, and is applicable, and that, therefore, for disobedience to the Inhibition, the Court, being the Court of Arches, and being the old Ecclesiastical Court, has a right to exercise its old form of process, that the Act of George III. applies to disobedience to that order of the Court, and that, therefore, for disobedience to that order, the Court not only were entitled, but were bound upon request to signify that disobedience and to obtain this writ. It seems to me, therefore, for all these reasons that the application with regard to the Inhibition fails, and that everything which was done by Lord Penzance in this case was done correctly within his jurisdiction—I am speaking now of Mr. Dale's case more particularly—and that it was most clearly and beyond any reasonable doubt done by him as the Judge of the old Court of Arches, and that there is no such thing here as a new Court, and no such thing here as a lay Court; but it is still the Ecclesiastical Court with all the guards which ever were necessary for the protection of ecclesiastics, namely, that it has the jurisdiction exercised by an authority emanating from the Archbishops, and by a Judge nominated by the Archbishops who are the heads of the Church.

But then, with regard to Mr. Enraght's case, it was said that the significavit was without authority, because the Inhibition mentioned other grounds, namely, that the Inhibition had gone further than the Monition, and that inasmuch as the Inhibition contains an Inhibition to exercise the cure of souls for a certain time, which is within the discretion of the Judge to name, if the extent of the Inhibition is made to depend upon matters recited in the Inhibition as to the reasons for it, some of which are not contained in the Monition; that inasmuch as it is impossible to say but that he might have exercised his discretion in that which was not within the Monition, therefore the old Inhibition is void, not under and by virtue of the authority of the decision in O'Connell's case, but by analogy with that case. I confess that if it could have been shown that the length of the term might have been determined with regard to a matter which was not within the Monition, but which was recited within the Inhibition, I should have thought that the analogy did apply, and that the Inhibition on that ground could not have been supported by analogy to the decision in O'Connell's case.

Then the question is whether the first of these propositions is made out. I had doubts about it, I must say, namely, that I did think that Mr. Charles had strong grounds to say that upon the information in this case, upon the trial originally this question of the stole could not have been brought forward, because it was not mentioned, and the Judgment is not given in respect of the stole, and that the Monition therefore, which could not go beyond the Judgment, did not have regard to the stole at all, but that the Inhibition certainly does recite it as a ground upon which the term of Inhibition is grounded, and that there was a strong argument therefore for saying that the Inhibition in this case had gone beyond the Monition which the Judge was entitled to put into it, namely, that he was admonished for using certain Ecclesiastical vestments, or from committing offences of the like kind, and this raises the question whether, upon Prohibition, we can say in this case that the Inhibition has gone beyond the Monition. If it had been a matter of Appeal before us I should have doubted myself much whether the Inhibition ought not to have been corrected in this case; but upon a question of

Prohibition it seems to me that we are unable to say that the fact of allowing the stole to be used as in the Inhibition is a matter which has gone beyond the Monition. Therefore I am of opinion that upon all the grounds for a Prohibition in both cases the Appeal fails and that everything that was here done in the Court of Arches was correctly done.

But then comes the question upon the Motion for *habeas corpus*. Now I take it to be a general rule which has always been acted upon by the Courts of Law in England, that if any person undertakes to procure the imprisonment of another, he must take care to do so by steps all of which are entirely regular, and that if a person procures the imprisonment of another without following every step in the process with extreme regularity, the Court will not allow that imprisonment to continue. The question here, therefore, is whether those persons who undertook to carry through the conduct of the writ, after the main matter had been properly signified to the Court of Chancery, have proceeded regularly or not. In my opinion they have not. For this purpose I take it that the matter was properly signified into the Court of Chancery. Then the writ is issued out of that office of the Court of Chancery, of which mention has been made, that has to be done under the statute of George III. which has been referred to, that statute is the first one which has to be construed. The statute of Elizabeth was referred to, but that statute of Elizabeth seems to me to have no force at all as of itself in this matter. The whole matter was regulated by the statute of George III., and all that we can do in looking to the statute of Elizabeth is to look at it by way of reference in order to see what are the words by which the reference in the statute of George III. are introduced into it from the statute of Elizabeth. We may treat the statute of Elizabeth itself as absolutely repealed, but nevertheless by reason of the reference in the statute of George III. as matter of drafting, we are to read into the statute of George III. certain words which were within the statute of Elizabeth. Now, assuming these words to be within the statute of George III., the enactment is "that the writ shall be forthwith brought into the Court of King's Bench, and there in the presence of Justices shall be opened and delivered of record." In the present case it may be said that the writ was brought into the Court of King's Bench, but the question is whether within the meaning of the statute of George III. it was brought there in the presence of the Justices. Now, Mr. Wills argued that even before what is called the Petty Bag Office Statute there would have been no occasion to bring this writ into the Court itself, because he said that these words, "and there in the presence of the Justices," were really merely equivalent to a description of the Court of Queen's Bench; but he was unable to reply to the point which was put to him from the Bench, namely, that if that be the meaning of those words, then it is a mere reiteration of the words immediately preceding it, and that those words are entirely futile and useless in the Act and have no meaning at all, because the expression, "into the Court of King's Bench" is equivalent to what is said to be *coram regis*, that is to say that these words describe the Court, and that if the next words describe the Court again it is a mere reiteration of the former words. That is not the proper mode of reading the statute, unless one is obliged to do it. One is bound to give some meaning to words. Now, all the cases that were cited upon this point (more particularly the opinions of Lord Chief Justice Holt, of Lord Chief Justice Parker, and very particularly of Mr. Justice Pratt), seem to me to shew that there were reasons why those words should have a meaning given to them, and that the reason why they should

have a meaning given to them is that the Secular Courts of the Queen when called upon to give the power of their jurisdiction to the accomplishment of any sentence in an Ecclesiastical Court would not do so without the Judge of that Court having the opportunity of seeing whether the documents coming from the Ecclesiastical Court were documents which they had power to issue. It seems to me that those cases shew that the meaning of those words is substantial and real, namely, that the power of the Court of Queen's Bench should not be exercised in order to enforce and assist the judgment of an Ecclesiastical Court without the Judges of that Court having the power of seeing whether that which they were asked to do within their power was a matter which the Ecclesiastical Court upon the face of the documents ought to have asked them to assist in doing. It seems to me that that is in express terms the Judgment of Mr. Justice Pratt, and that it is really the meaning of Lord Chief Justice Parker and of Lord Chief Justice Holt. The Judges of the Queen's Bench Division have not differed from that. Lord Coleridge expressly states that he thinks these are not mere directory words, by which I understand him to mean that at all events these words are not futile. He seems to agree with the Judgment of the Judges in the former cases, and so does Mr. Justice Field, and so far as I can see, subject to a minute doubt, does Mr. Justice Manisty. Therefore they all agree upon that point; and it seems to me to be a real substantial matter. But then it is said that the Court below were of opinion that this substantial matter was repealed, not that it was repealed because they were mere words of form, but that although they contain a special enactment, nevertheless they were repealed by the statute with regard to the Petty Bag Office. Now that statute assumes to deal only with the issue of the writ out of the Petty Bag Office. It does not assume to deal at all with the conduct of the Court of Queen's Bench with regard to it when it comes to them; and yet the whole point here with regard to the statute of George III. is whether this matter was rightly conducted after the writ had left the Petty Bag Office—after it was issued, and when it came to the Court of Queen's Bench. The statute does not assume to deal with that matter at all. The statute does deal with the question of issuing the writ from the Petty Bag Office, and that I accede to. It seems to me that that statute does so far repeal the statute of George III. as to say that this writ may issue from the Petty Bag Office out of term, and that it may be made returnable in the Queen's Bench out of term. Those are express matters which are stated in that statute. But then does it repeal this substantial enactment, that when it arrives at the Queen's Bench it is to be opened in the presence of the Judges? It is said that it does by implication. It cannot do so unless that is the necessary implication unless the two statutes cannot stand together. It seems to me they can stand together; namely, that the writ may issue out of term, and that the writ may be returnable out of term, but that nevertheless it must be taken into the Court of Queen's Bench not for the mere purpose of its being brought into a particular building but in order that the Judges there may have the opportunity of seeing whether upon the face of it it is a writ with regard to which they ought to exercise their power. Reliance was placed upon the book which was produced from the Crown Office. With regard to the practice before the statute as to the Petty Bag Office, it seems to me that that book was directly contrary to the contention which Mr. Wills had to support. It seems to me that that book showed not only that invariably the writ had been brought into the Queen's Bench, that is to say, the statute of George III. had been

construed in the way in which I think it ought to be construed; but it was said that, by way of form at all events, it was handed up to the Judges, and the endorsements on the writ contained the words that whatever was done with that writ when it arrived in the Queen's Bench was done in Court; and Mr. Robinson, whose authority was vouched and rightly vouched, had given by the alteration which he had made a meaning to the words "in Court"; because upon his view of the construction of the Petty Bag Statute he had struck out the words "in Court," showing clearly that he had understood the words "in Court" in the former endorsement to mean actually in Court in the presence of the Judges. But then it is said that the great authority of Mr. Robinson and the alteration which he made from the time of the passing of the Petty Bag Statute must be treated as matter of contemporaneous exposition with reference to the statute. I confess that I must absolutely and wholly deny that the alteration of Mr. Robinson's, however eminent he might be, and as eminent as he was, is to be taken as coming within the doctrine of contemporaneous exposition. It is obvious that Mr. Robinson had intended to construe, or thought he had construed or understood the statute of the Petty Bag Office as repealing this part of the statute of George III., but upon that his view of the construction of the statute is not an authority which can be produced in Court at all, and it was open to the objection which my Lord took to it, namely, how can you ask us to be bound by the authority of Mr. Robinson when we have a right to overrule the decision of the Judges of the Court of Queen's Bench? It was suggested that Mr. Robinson would not have made that alteration in his book without consultation with the Judges of the Court of Queen's Bench, and therefore it must have been done upon that authority. As a matter of fact I have not the smallest doubt that in making the alteration in his book he never consulted any Judge of the Court of Queen's Bench.

I think, therefore, that the appeal here as to the prohibition fails, but that upon the application upon the *habeas corpus* those persons who undertook to conduct this writ in order to obtain the imprisonment of Mr. Dale and Mr. Enraght have failed in conducting their case, because, by not an unnatural mistake, they have conducted it in an irregular mode. I desire to state that though in this case I consider that that irregularity is matter of substance, I should be of the same opinion if it were only a matter of form, because I take it, as I have said before, to be a general rule that the Courts at Westminster will not allow any individual in this Kingdom to procure the imprisonment of another unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment. I take it that that was the rule of the Courts whenever any irregularity was pointed out in the execution of the writ of *capias ad satisfaciendum*. It is a wholesome and a good rule, and is in accordance with the great desire which English Courts have always had to protect the liberty of every one of Her Majesty's subjects.

LORD JUSTICE COTTON: In this case the Appellants seek to be released from custody on various grounds, which may be summarised in this way, as coming in part under the applications for Prohibition, and in part under the applications for *habeas corpus*. Now, before coming to the different questions which arise, I should like to say one word as to what we are dealing with. We are not dealing with the question whether there is a punishment which has been rightly inflicted upon the Appellants. It is no question of

punishment; it is merely a question as to whether the process to enforce obedience to an Order of the Court has been rightly issued and rightly used; and it is a mere process of contempt for enforcing obedience to the Order for the Prohibition, not an Order prohibiting them from continuing certain practices which have been declared to be illegal, but an Order no doubt founded on the fact of their having been found to commit illegal practices. Because the Order prohibits them not from continuing any practices, but from performing any act of Divine Service within the churches, and, I think, within the diocese. So that it is a matter utterly unconnected with the practice with reference to which the suits were instituted, and is in no way whatever to be treated or considered as a punishment, but as simply a proceeding which has been taken to enforce obedience to an Order of the Court; and all lawful orders of a competent Court ought to be obeyed.

Now, first on the Prohibition it has been said that the Court has no power at all to issue a significavit in order that process might issue to enforce the order of Inhibition. That clearly depends on the Act of Geo. III., and I will consider what the points were which were passed in argument, and see whether any objection can be taken to the power of the Court to name the significavit on any of the grounds that have been taken. The statute applies in all cases which, according to the laws of this realm, are cognisable in an Ecclesiastical Court, and the person against whom the writ issued must be a person lawfully cited to appear in an Ecclesiastical Court, and he must have disobeyed a lawful order.

Now those are the three matters with reference to which the argument of the Appellants was addressed. Now, on the first point, that this was a matter cognisable in an Ecclesiastical Court I need say hardly anything. There was some argument addressed to it, but in my opinion it raised no doubt whatever, because this matter, not by particular legislation before the statute, was always a matter cognisable in an Ecclesiastical Court, and was always a matter (subject to what I shall have to say at a later stage as regards the Statute of Citations) cognisable in the Court of Arches, but it certainly was a matter cognisable in the Ecclesiastical Courts.

Then we come to the question, and no doubt it is a serious one, although it is one on which I entertain not the slightest doubt, whether the appellants here have been cited to appear in an Ecclesiastical Court, that is to say, whether Lord Penzance, when he made the order, was acting as and was a judge of an Ecclesiastical Court. Now, for my own part, I decline to decide what would have been the result if this had all taken place before the vacancy had occurred in the Court of Arches, in the Provincial Court of Canterbury. No doubt it may fairly be an argument that you must regard the status of the judge before that occurred, in considering whether, after that vacancy had occurred, he can be considered as a Judge of the Court of Arches, and a Judge of an Ecclesiastical Court, and if there were any doubt on the construction of the statute as to what his position was after the vacancy had occurred. I should have considered and dealt with that; but as it is a matter not before us, and in my opinion not necessary to be considered, having regard to the provisions of the statute after the vacancy occurred, I decline to deal with it.

Now what does it say?—It says that whenever a vacancy shall occur in the office of Official Principal of the Arches Court of Canterbury, the Judge shall become ex-officio such Official Principal. Now stopping there, what is this?—That the person there described as the Judge who is a person who

has been appointed to certain offices (I will not consider what) by the Archbishops of Canterbury and York shall become the Official Principal of the Arches Court. From that time, at all events, he is the Judge of that Court; all acts done by him are acts done by him as head of that Court, and his orders are the orders of the Court. But then it was said that doubt was thrown upon that by these words—"That all proceedings thereafter taken before the Judge in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury." Now, one explanation of that has been given by the Attorney-General, which I think is a good one; but there may be another explanation, and, in my mind, whether it was the intention or not, it has this effect, that these words clearly showed that, even after there had been a vacancy in the office of Official Principal, and the person named as the Judge had become the Official Principal of that Court, the old Court was not to be at an end, but the Arches Court was to be continued, and he was to be considered as acting in and as a Judge of that Court. Probably it was merely put in for the purpose of removing any doubt on that question when there should be only one person and only one Judge of both Courts, and to prevent any argument that, when that event occurred, the two Courts as separate and distinct Courts were at an end, and all that existed was some Court constituted by Act of Parliament. In my opinion, we are not dealing here with a Court constituted by Act of Parliament, we are dealing here with the old Ecclesiastical Court—the Court of Arches, the Court of the Archbishops exercising the Ecclesiastical functions of that Court. Now, it must be that the person is cited to appear in that Court; and if that is, as I say, an Ecclesiastical Court, we have all the requisitions of the statute complied with.

But there are other objections which I will deal with. It is said that even if this is not a new Court, there is a new jurisdiction given to it. Now, I think we very often fall into difficulties from not accurately defining what we mean by the general language we use. No new jurisdiction is given to the Court of which Lord Penzance is the Official Principal, as regards the subject matter. That is clear. This was a subject matter which was within the cognisance of all the Ecclesiastical Courts, and within the cognisance of the Court of Arches. It is a very different thing to say that new jurisdiction is given as against individuals; new jurisdiction given in the sense of a different subject matter being brought within the cognizance of the Court. When you say that new jurisdiction, as against individuals, is given, what, as a rule you mean, and which can be the only sense attributed to it in the present case, is that you have power given to you to cite and compel appearance as against persons whom otherwise you could not have cited and compelled to appear. But when one looks to the Statute of Citations, and considers what, if anything, is done here, it only removes certain restrictions which were imposed by the Statute of Citations over the power of the Arches Court, from citing before it individuals not in the diocese in which they resided. It was not that the Court of Arches had no original jurisdiction. The Statute of Citations does not take away its original jurisdiction, but simply prohibits that Court, for the benefit of persons who might be cited out of their diocese, with certain exceptions, from citing persons beyond that diocese. The exception shows that it had original jurisdiction, and there is a passage from Sir John Nichol, which I will quote, showing it was merely taking away the power of compulsorily enforcing appearance, and not taking away any jurisdiction which was given by the Statute of Citations. Sir

John Nichol, in "Chesterton D———" (I quote it from Phillimore, page 1286, and I have looked at the report) says this:—"It is certainly true that both the canon and the statute law forbid the citing of parties out of their diocese or peculiar jurisdictions. But it is equally true that the rule, at least in the statute law, was meant for the benefit of the subject, which benefit it hath uniformly, as far as I see, been held to provide for sufficiently by giving Defendants who are so cited a privilege of pleading to the jurisdiction." But if they appear voluntarily and do not raise that plea to the jurisdiction then the Court has jurisdiction over them. So that even if in any sense it can be said that new jurisdiction was by this Act given to the Court of Arches, it was only the power of citing compulsorily, and not a new jurisdiction as against subject matter. That is an important distinction; and if it is only new jurisdiction in the sense of being able to cite persons whom it could not otherwise have compelled to appear, then in exercising that without doubt it will have all its original powers, and will be acting as the old Court, though with power given to it to compel appearance which it would not otherwise have had. That being so, all pretence for saying that a new jurisdiction is given to this Court in the sense of its having power to deal with new subject matter, and to exercise an entirely new kind of jurisdiction or judicial faculty, in my opinion disappears.

But then it is said that new powers were given to it under section 13, and that, therefore, the old powers of the Court as regards orders made under that section cannot go with it. It is true that a new power, or I will assume it is true, and I think it is, is given by that section of making an order which, according to the practice of the Ecclesiastical Court, would not have been made in consequence of disobedience to a Monition; but then it is the order of the Court, and if it is once the order of the Court, no principle can possibly require us, or enable us to say that in enforcing that order, although without that statutory authority he could not have made it, the Court is not to have and has not the power which it had originally in enforcing any order which it may have made without that special power. What we have to deal with is the statute of Geo. III. Is not this an Ecclesiastical Court, although it is exercising this new power? Is it not a matter cognisable in an Ecclesiastical Court? Then comes the question whether it is a lawful order of the Court which has been disobeyed, and that I will deal with presently; but, before I do so, I will just advert to this, which was pressed upon us in the argument, that in some of the cases ("Hudson *v.* Tooth" is one, I think, which has arisen under this Act) expressions were used by some of the Judges in the Queen's Bench Division, which seem to say that this was a new jurisdiction and a new Court. If they did say so I should decline to follow what they so laid down; and as we are asked here to review one Judgment of the Court of Queen's Bench, I should say that was erroneous; but if one really looks at what they decided it is not upon a fair interpretation of their language any expression of opinion that there was a new jurisdiction given or new Court, inconsistently with what I have said. What was principally relied upon was what was said by Lord Justice Lush in that case of "Hudson *v.* Tooth"; but I pointed out in the course of the argument that what occurred there was this: Mr. Tooth had been cited to appear in a place not sanctioned by the Act, and, under the Act, the power of citing is to be to cite in certain places. That had not been followed. Mr. Tooth in that case did not appear, but let the matter go on by default. There was no power to compel appearance, and the Court going on in the absence of the

party cited had no right to do so, and the Judgment was *ultra vires*, and was a judgment which could not be enforced. But that is entirely different from the question which I have been considering, and therefore the expression used by the Judge must be considered with reference to the question before him. He particularly notes in that case Mr. Tooth did not appear, but let the case go on in his absence, and says, that being so there was no jurisdiction, because the place to which he was cited to appear was not a place in which he could be cited to appear compulsorily. Therefore, in my opinion, that is not in any way inconsistent with our judgment. And now comes the question whether the orders made in this case were lawful orders. Now, as regards both cases, it is said that this was not a lawful order, for that the statute gives a remedy, and, therefore, it was the only remedy if a clerk refused to obey the Order of the Court. Now, if the question were whether this significavit could be issued for disobedience to a Monition, one would have to consider whether the remedy given by section 13, for disobedience to the Monition, is to be on the true construction of the Act the only remedy; but I need not deal with that question, for we are dealing not with the question whether disobedience to a Monition can be enforced by significavit and writ, but whether disobedience to the order inhibiting the performance of Divine Service can be enforced, and as has been already pointed out there is no penalty attached by the Act to disobeying such an order. The avoidance of the living will result if that order is disobeyed, unless there is submission; the power of the Bishop to sequestrate does not depend upon whether the Order of Inhibition is obeyed or not, but on whether the Bishop, that order being obeyed, thinks there is sufficient provision made for the services of the Church, and there is no penalty imposed by the Act for disobedience to this order. Nothing which can be said in the construction of the Act upon this section takes away the power of enforcing the order if it otherwise exists. But then it is said, and that I will deal with, that we can see in the Act another ground for saying that no significavit or writ can be issued to enforce the order. It is said, here is the Bishop, he has power, under certain circumstances, of dealing with the matter. He is the person who, if his Monition is disobeyed, must make an Order of Inhibition, and as he would have no power to issue a significavit neither can the Judge.

In my opinion, even if the Bishop were the person who was to make the order for Inhibition in cases where he had dealt with the matter by the way of Monition, the consequences would not follow. If a person has power to deal with the matter who, from his position, has not such an office as would entitle him to issue a significavit in order to enforce obedience to his order, tical Court, or the Judge of that Court, under the Act, has power also to because he could not be considered an Ecclesiastical Court, if an Ecclesiasmake the order, why is he to be deprived from such an inference as that of the power he would otherwise possess of enforcing his order? In my opinion that would not be a wise, fair, or proper construction of this or any other statute. But the foundation of it fails, because, in my opinion, the Bishop, if he deals with the matter in any extent, is not the person to make the order necessary for Inhibition.

The Bishop acts only by the consent of the parties, and as far as the consent of the parties goes, what he has to do is this: "If both parties agree to submit to the direction of the Bishop without appeal, the Bishop shall forthwith proceed to hear the matter of the representation, and shall pronounce such judgment and issue such Monition as he may think proper, and no

appeal shall lie." That is when the parties say, "We will agree to submit to your direction;" but, if they do not submit, why is then the enforcement of the Monition of the Bishop necessarily to come before him? It is true he has to decide whether his Monition has been obeyed or not, but when that is so there is no word in the Act saying that the Bishop is to deal further with the matter, and there are words in the Act—I refer to the end of the 13th section—which do point to this, that the Judge is to act in the matter as to directing proceedings for enforcing obedience to the order; it has not been said that the Bishop is to go further than the parties have agreed he shall act. In my opinion his function, except so far as the Act says the contrary, is restricted to giving his directions which the parties have agreed to be bound by, and therefore the foundation of the argument addressed to us by Mr. Charles on that point, in my opinion, fails.

Now we come to another question. Are the orders for the Monition and the orders for the Inhibition wrong in both cases? Now as to that, I confine myself to this: In my opinion the Act of Parliament gives power not only to make new rules without forms but to make forms as part of the rules, and as these forms referred to in the rules as proper forms were properly made under the authority of the Act, and as the orders in both cases for the Monition follow the form given in these rules, in my opinion that is sufficient, and if there were (I do not say there was) any objection independently of the rules and forms, it is cured by following the form. Now, there is one objection to the form of the Inhibition peculiar to Mr. Enraght's case, and I will deal with that. As I regard it, it is this, that the Monition admonished him from unlawfully wearing certain vestments, and inhibited him from "allowing or permitting other persons unlawfully to do the same, and also from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth." Now, the Act says at the latter end of the 13th section—"Any question as to whether a Monition or Order given or issued after proceedings before the Bishop or Judge, as the case may be, has or has not been obeyed, shall be determined by the Bishop or the Judge, and any proceedings to enforcing obedience to such Monition or Order shall be taken by direction of the Judge." This was the Monition of the Judge in the present case, and therefore he has to determine whether it has been obeyed or not; and when one finds that he has decided that certain vestments, although not mentioned in the Monition, are unlawful vestments, and there is in the Monition the warning against doing any acts similar to these specially mentioned, I think it is impossible for us to say that the Judge has exceeded his power in saying that the permitting the wearing of a biretta and albe is an offence of a similar character to that which was dealt with when he made the Monition.

Of course a Judge ought, in my opinion, to be very careful how he introduces in the grounds of his granting an order of Inhibition any matters not dealt with in his original judgment, and when he was giving the order for the Monition, but whether he has acted with a due exercise of judicial discretion or not is matter of appeal, and we must not be led into saying that there is an excess of jurisdiction, so that the order is to be treated as a nullity, by any doubt as to the power of appeal given by the statute, or as to any view that if we were sitting here as Appellate Judges, hearing an appeal from the order of the Judge of the Arches Court, we should have taken a different view as to what ought to have been done by the Judge on the facts brought before him. In my opinion, having regard to the form of these general

words in the order of Monition, and what it is that has been introduced *de nove* in the order of Inhibition, we cannot say that there has been an excess of jurisdiction in framing the order of Inhibition as it is.

Now I come to the *Habeas Corpus*, and there, having before me the opinion of the Court below, I must say I think the conclusion at which they arrived is wrong. Now what we have to deal with is this. Here is a statutory writ issued under the 53 George III. and that statute expressly provides that certain provisions which it does not name and put in terms into the Act, but expresses by reference to the Act of Elizabeth, shall be followed in all proceedings under the Act, and proceedings under which the significavit was made and the writ was issued. Now I quite agree with Lord Justice Brett that when persons take upon themselves to imprison or cause another to be imprisoned, they must strictly follow the powers given, and if they do not the person imprisoned must be discharged. But what have we to consider here? It is not, in my opinion, in any way a mere matter of form, because it is a matter of substance. The Act of Elizabeth, to which one has to refer for the term, says—I omit in Term time—that the writ may issue out of the Petty Bag Office, and that after the same writ shall be so made and sealed, then the said writ shall be forthwith brought into the said Court of Queen's Bench, and there in the presence of the Justices shall be opened, and being opened it is to be recorded. Lord Justice Brett dealt with one argument of Mr. Wills, that this only meant that it was to be brought into the Queen's Bench and enrolled. But there are two things—it is to be brought into the Queen's Bench and there in the presence of the Justices it is to be opened. In my opinion it would be wrong as a mere matter of ordinary construction of any document to say that these latter words "in the presence of the Justices" can mean nothing more than that which had been originally expressed by "brought into the Court of King's Bench." No doubt precedents were cited to us, where in pleas or any other matters a man was cited to appear before our Sovereign Lady the Queen, or our Lord the King in his Court—that means that the matter was in the Court of King's Bench, but that is already expressed there; and it was said that these words were equivalent to the words "and there before the Justices." It is said that is equivalent to the Court of Queen's Bench, but we have something else, and what is it? In my opinion if one looks at the statute alone one would say that this meant that there should be something done before the Justices of the Court of Queen's Bench, which was going to take upon itself the enrolling and consequent enforcement of this writ, that is to say, by seeing that the sheriff did his duty, and by seeing that the process issued. The writ issues as of course out of the Petty Bag Office when a significavit is brought there. There had been irregularities in enforcing and not enforcing the writ, and, as I understand, both these statutes in substance say this—"We give greater facilities, or, we give means of seeing that the sheriff does his duty. We give, consequent upon his being enabled to take the man's person, greater means of taking him, but with this safeguard, that before the writ is put into the hands of the sheriff who is to enforce it, it shall always be brought into the Queen's Bench, and there opened in the presence of the Justices, and why? That they might see that the Ecclesiastical Court should not without sufficient reason get the benefit of the process of the Secular Court in order to take the person who is charged with an Ecclesiastical offence. It is true that as a rule the Court itself, the Judges of the Court, would never read the writ that was brought before them to see whether it had, or had not been properly

issued; but if it is brought into Court and handed to the officer, he at once, if there is any doubt, can consult the Judges as to whether or no it is a writ that ought to be enrolled or not. Now we are not really here bound to enter into the question as to whether it ought to be brought into open Court, or whether it is sufficient to take it to one of the officers of the Court while the Court is sitting. What the Respondent here contends is this, that that portion of the statute is sufficiently complied with if the writ is taken not in open Court but into the office of the Court when the Judges are not sitting, and whom the officer of the Court cannot therefore consult at the time. In my opinion that is wrong. That deprives the subject of that protection which is given by the statute, that the writ shall not be put into the hands of the sheriff without at least the opportunity of the Judges being immediately consulted, if there is any doubt whether the writ has been properly issued or not. In my opinion it ought to be brought into open Court, because one knows it is much more probable, having regard to the general way in which men deal with matters, that if there is a slight doubt in the mind of the official, he will at once ask the Judge, whom he is sitting below, about it. He can immediately speak to him, which he cannot do if he were in some office, some miles away from the place where the Judge is sitting, or at any rate out of the sight of the Judge so that there may be some delay in consulting the Judge. In my opinion this is a provision of the statute that it should be brought into Court so that the attention of the Judges may be directed to any possible question as to whether the writ has or has not been properly issued, and although there is no express decision on that point in any case, for the exact point does not seem to have arisen, yet in my opinion what was said by Lord Chief Justice Parker and Mr. Justice Pratt in that case of the *King* v *Theid* strongly bears upon it and strongly supports the view which I and the rest of the Court take. Because what Chief Justice Parker says is this—the question in that case was whether or not the writ might be quashed before the return day—"Certainly this Court might have quashed it before it was delivered to the sheriff, and *a fortiori* therefore now, for it is no more for us to correct our own mistake by calling back a writ issued through our oversight." Unless the writ were to be brought into Court or the Judges must be taken as looking at it, how could there be any oversight on the part of the Judges, and how could there be any mistake that they would have to correct. Then Mr. Justice Pratt says:—"I take the reason of the provision, that this writ issuing out of Chancery and returnable into this Court, must first of all be opened in the Court, and in the presence of the Justices of this Court be delivered to the sheriff, to be a provision in favour of the liberty of the subject, that the subject may not be deprived of his liberty by writs which issue of course out of Chancery, until such time as the Judges of this Court see whether he has deserved it or not." In my opinion that, although it is not an express decision, does most strongly support the view which I take, and as has been mentioned by Lord Justice Brett on this part of this case, independently of the question which I shall now deal with, the Judges of the Queen's Bench division were also of opinion that the omission was one which would be fatal but for a subsequent statute.

Now it has been said that this has been authorised by the statute. I do not deal with the question as to whether the writ could be issued by the Petty Bag Office out of Term or not. I think probably it could, but that is unnatural. I am dealing with the question "opened in the presence of the Justices." It is said that the Act relating to the practice of the Petty Bag

Office repeals that. In my opinion it would be quite wrong, without very strong necessity to hold that such a statute as that intended to regulate the practice of the Petty Bag Office could repeal the provision in the statute of George III. if I treat it as a provision in that statute which was introduced there for the protection of the subject. But in my opinion it has no such effect; a later statute does not repeal another without express terms unless the two cannot stand together. Now it was argued by Mr. Wills that that statute regulating the practice of the Petty Bag Office meant this, not that writs might be issued in vacation time, but that all writs might be made effectual in vacation time. There is nothing of that sort in the Act. It is only that writs may be issued in the vacation and made returnable in the vacation, and that is not in any way inconsistent with this, that some of these writs, before they can be made effectual or be put into the hands of the sheriff, must be taken before the Court while it is sitting, and there the Judges of the Court must consider before they put it into the hands of the sheriff, whether or no it has been properly issued, so that they can direct the sheriff to enforce it. The Judges of the Court below seem to have dealt with that in this way, that the writ may be issued in vacation, and may be returnable in vacation. They seem to have construed "may" as "must," that is to say, that if a writ might be issued at the beginning of the long vacation it must be returnable in the long vacation too. But there is nothing of that sort, whenever it is necessary in order to make the writ effectual, that the return day shall be at a long period because the vacation intervenes, the officer in the office will make it returnable on a distant day, and it is not in any way a fair or true construction of the Petty Bag Office Act that a writ issued at the beginning of the vacation must be made returnable after twenty days, or at any time within the vacation; and if that is so, there is nothing whatever in the second Act inconsistent with the provisions of the first Act, which requires that before that writ could be made returnable, that is, before it can be put into the hands of the sheriff, and therefore before it can be made returnable, it shall be brought into open Court when the Judges are sitting. In my opinion there is nothing in the subsequent Act which can be construed in any way as repealing the provisions of the Act of George III. to which I have been referring. Now the practice has been referred to. The practice cannot really alter the Act of Parliament, and although it is true it is said there are a number of cases in which these writs have been issued and made returnable in vacation, and put into the hands of the sheriff when the Court was not sitting, yet it was not shown in any way that under any one of these writs any one has ever been taken. There is no opportunity of testing whether the practice was right. It here comes before us for the purpose of saying what is the right of the subject, and in my opinion the appellant is right in saying that here was a provision in the Act 53 George III., a provision necessary in order to enable the writ to be put into the hands of the sheriff and made effectual against him, which has not been complied with, and that being so he is entitled to his discharge.

Lord Justice James: You know what the principle of the judgment is, all the applications for prohibition fail. The applications as to the arrest succeed. You had better consider what the result is. The appeals as to the prohibition would all be dismissed with costs.

Mr. Wills: And the *certiorari* also?

Lord Justice James: Yes, of course.

Mr. Wills: And the *supersedeas*, I do not know how that stands.

Lord Justice James: I am not quite sure about the *supersedeas*.

Mr. Charles: I do not invite your Lordship to give any judgment on that Rule of *supersedeas*. I am satisfied with the decision on the *habeas corpus*.

Lord Justice Brett: You do, on the *habeas corpus*.

Mr. Charles: Yes, but not on the *supersedeas*.

Lord Justice Brett: Had you better not withdraw that?

Mr. Wills: It had better be disposed of one way or the other, because we do not know where we are, unless the Judgment is given. The writ issued properly—it is only something that has been done with it since.

Lord Justice James: I feel a great difficulty in superseding the writ.

[Their Lordships consult.]

You know our Judgment, and can go through it, and see exactly what will be the result, and draw up the order.

Mr. Charles: In the meantime I ask your Lordship to order the discharge of Mr. Dale.

Lord Justice James: Yes, of course he will be discharged.

Mr. Charles: He is here, my Lord. As to Mr. Enraght, I have to ask your Lordship to make the Rule absolute for a writ of *habeas corpus*. Further than that, I ask that it shall be returnable on Monday at Chambers, if it can be.

Lord Justice James: Cannot they discharge him without that?

Mr. Charles: I should have thought they might, but the Master of the Crown Office seems to have a doubt about it. I hope your Lordships will make an order that he be discharged this evening.

Lord Justice James: Mr. Dale is discharged, of course.

Mr. Charles: But about Mr. Enraght, my Lord.

Mr. Wills: I should think it might be done by consent.

Lord Justice James: If we have the power, of course we would order him immediately to be discharged, and telegraph down.

The Master: I think your Lordships have the power.

Lord Justice James: Then we order him to be discharged. With regard to the details of the working out of our judgment you must put your heads together and see what the orders will be.

Mr. Charles: There is only one other matter I would mention; as to the *habeas corpus*, I should ask you——

Lord Justice James: The *habeas corpus* would not be wanted if he is discharged.

Mr. Charles: But with regard to the costs of the application, my Lord?

Lord Justice James: You had better consider what will be the mode of working out our decree and mention it when we have time to apply ourselves to it; we really have not time to-day.

Mr. Charles: Your Lordship did say that the rule for prohibition should be discharged with costs, and I should ask that the rule on which I succeed should be allowed with costs.

Lord Justice James: Of course. Is there any question of costs upon that?

Mr. Charles: On the Appeal, my Lord. Their Lordships decided that against me, and discharged my rule in Mr. Enraght's case with costs. So long as your Lordship will say I shall have the costs of the Appeal upon which I succeeded, and such costs in the Court below as I may be entitled to I am satisfied.

Mr. A. L. Smith: He would not be entitled to the costs of the appeal as against the Judge.

Lord Justice James: Lord Penzance will have all his costs.

Mr. Wills: Had not the whole question of costs better be dealt with afterwards?

Lord Justice James: I understand Lord Penzance has no interest except in the matters which have failed?

Mr. Wills: No, my Lord. Lord Coleridge declined to grant Lord Penzance costs in the Court below. Lord Coleridge said that if a learned Judge thought fit (as to that, of course, he said nothing) to appear and argue the prohibition which he need not do, that he would not give him the costs. He said he had never known a Dean of the Arches have his costs.

Lord Justice James: I think we must discuss that again another day; you must work out the principle.

Mr. Charles: The whole question of costs will be left to be dealt with?

Lord Justice James: Yes.

JUDGMENT OF THE QUEEN'S BENCH DIVISION

IN THE CASE OF

THE REV. T. P. DALE *v.* LORD PENZANCE AND OTHERS.

Delivered, December 13, 1880.

PRESENT

THE LORD CHIEF JUSTICE (LORD COLERIDGE), Mr. JUSTICE FIELD, AND Mr. JUSTICE MANISTY.

THE LORD CHIEF JUSTICE: I have now to give judgment in these four Rules, which it has been agreed shall be heard and determined together, because, as the four Rules raise a variety of points which are all more or less connected, it is far more convenient that a single argument should dispose of them all.

The Rule in which Mr. Dale is defendant raises technically the question whether the writ *de contumace capiendo* is good, either in itself, or in respect to the proceedings which have taken place since it was issued, and whether therefore, it affords a good answer to the writ of Habeas Corpus. The three Rules in which Lord Penzance is defendant raise in various forms the question of his jurisdiction. One is to prohibit him from proceeding further in the matter of Mr. Dale; another to supersede the writ *de contumace capiendo* on the ground that the Monition, Inhibition and Significavit were issued by Lord Penzance without jurisdiction, another for a Certiorari to remove and quash the Monition and Inhibition of Lord Penzance and the Requisition of the Bishop of Exeter on the ground that they are all defective for want of jurisdiction. All those Rules raise in various forms, and on various grounds objections to the jurisdiction of Lord Penzance. The first one raises certain further questions as to the writ *de contumace* after it was issued from the Petty Bag, and the determination of those questions in Mr. Dale's favor might entitle him to his discharge, even although everything done by Lord Penzance was done in proper form, and within his jurisdiction.

It would be convenient to consider the points as they arise in order of right reasoning and to dispose of them, so as, if possible, not to go over the same ground twice.

First, then, it is said that before Lord Penzance was entitled to exercise any judicial function as Official Principal of the Arches Court of Canterbury he must have taken the oaths and made the subscription prescribed in the 127th of the Canons of 1603 and 1604. It was contended that the Canon is still binding and the case of the *King* v. *Verelst*, 3rd Campbell, page 432, was cited as shewing that the appointment of an Ecclesiastical Officer contrary to the Canon, to use Lord Ellenborough's words, and, therefore, if the case is in point, the appointment of Lord Penzance must be treated as a nullity. There are minds, I suppose, though it is very difficult to realize the supposition, to which an objection of this sort appears to have reality and substance, but I am of opinion that there is nothing in it. I do not rest my decision on the argument that the Official Principal of the Arches Court of Canterbury is not within the 127th Canon. If it were necessary, as it is not, to decide that question, I should, as at present advised, hold that he is within it. Neither do I rest my decision upon the recent changes made by Parliament in the law of oaths and subscriptions. It seems to me that the 37th and 38th Victoria, chapter 85, section 7, has conclusively settled this question. It is the law of the realm, binding on all the subjects of the Queen, that in certain events, which events have in fact happened, Lord Penzance shall become Official Principal of the Arches Court of Canterbury, and, therefore, that is after he has so become Official Principal, which he has in fact become, and which in fact he is, all proceedings taken before him in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury. Mr. Dale's is such a matter, and these proceedings are such proceedings, and it appears to me, therefore, that the question is concluded. It is a fact that, by the first paragraph of the 7th section the earlier part of the 127th Canon which refers to qualification has been abrogated. It is plain to me that by the 3rd paragraph of the 7th section, that part of the 127th Canon which refers to oaths and subscriptions has, if it ever bound the Official Principal of the Arches Court, been abrogated likewise. It is unnecessary to say more. But I will point out that the *King* v. *Verelst* is not in point. That case decides that where an Ecclesiastical Officer is appointed contrary to the only law which governs his appointment, such appointment is bad. It is used in support of the contention that where an appointment is unquestionably valid by Act of Parliament, a Canon can annex conditions to the exercise of the function of it, by the person so appointed, a contention to which the *King* v. *Verelst*, when accurately examined, yields no support whatever. The defendant's first point therefore, entirely fails.

Next, it is said that Lord Penzance had no jurisdiction, because, his jurisdiction rests upon the transmission of the representation by the Bishop to the Archbishop, and upon the requisition by the Archbishop to the Judge, according to the provisions of the 9th section of the 37th and 38th Victoria, chapter 85, taken together with and qualified by the provisions of the 16th section. Now here it is said that the appointment of the Bishop of Exeter to act both for the Bishop of London and the Archbishop of Canterbury, both of whom were, within the meaning of the 16th section, patrons of Mr. Dale's preferment, was a bad appointment, and that even if it were good, his requisition to Lord Penzance was bad on its face, for not stating that a copy of the representation was transmitted to Mr. Dale, according to the provisions of the 9th section, and conferred therefore on Lord Penzance no jurisdiction to hear the matter of the representation. It is, I know, quite in vain to protest

against the time of a Court of Law being wasted, as I think it has been, upon questions such as these; they are raised and they must be decided; but, before I decide them, I must observe that from this point in the discussion to the very last of the acts of Lord Penzance, it has not been even faintly suggested that anything wrong has been done in point of fact, that any notice has been omitted; that there has been any hasty action that in one single point, however small, the substance of justice has been violated. All the proceedings have been in fact, according to law, and of all of them Mr. Dale has had notice; on none of them has he attended; against none of them has he made any defence; and now, when he has brought upon himself the punishment of disobedience to the Orders of one of the Queen's Courts, he comes to another of the Queen's Courts, not to complain of that, for, as I have said, we have heard no suggestion of any unjust or illegal act of the former Court, but to take exception, if he can, to the phraseology of the various legal documents in which these Acts have been stated. It is no part of my duty to express any judgment on such conduct. It is I think my duty to state it with strict accuracy.

Now, his first point is that under the 16th section, as the Bishop of London and the Archbishop of Canterbury were both Patrons of St. Vedast, one Bishop should have been appointed under the Sign Manual of the Queen to act for the Bishop and another for the Archbishop, because under the 9th section the Bishop is to determine whether the case is to be heard, and the Archbishop is to fix the area for the hearing. The point is nought. Under the 16th section the Patron Bishop discharges none of the duties imposed on a noninterested Bishop by the 9th. If the papers come to him he simply has to send them on to the Archbishop as papers which have reached him wrongly, and with which he has nothing to do. In the case of a Patron Archbishop, which is this case, the Queen may appoint under her Sign Manual, as in this case Her Majesty has though fit to do, a Bishop or an Archbishop to act in the place of the disqualified Archbishop. In this case it appears that the Bishop of Exeter was appointed in terms to act both for the Bishop and the Archbishop. The appointment to act for the Bishop was, I think unnecessary and may be rejected without in any way affecting the validity of this appointment to act for the Archbishop, but, if it were necessary, the same Bishop may be well appointed to act for both. The Act of Parliament does not forbid it. The functions of the two though different are in nowise inconsistent, and may well be performed for the two by one and the same person.

Next it is said that the Requisition of the Bishop of Exeter conferred no jurisdiction on Lord Penzance, because it did not state, first, that the representation had been transmitted to Mr. Dale; next, that the parties had been required to state whether they would submit to the directions of the Bishop; thirdly, that they had not stated their willingness to submit to the Bishop; fourthly, that they had not stated the place where the matter was to be heard.

Now, as to the first objection, it appears to me, that it was wholly unnecessary to state in the requisition the fact that the representation had been transmitted to the incumbent. It was an incident of procedure not a fact essential to jurisdiction. As to the second and third objections, I think that they fail in fact. The requisition appears to me by necessary intendment to state the facts which it is argued are omitted. As to the fourth, I think that within the meaning of the Act of Parliament the place

is stated. It would be enough if the words of the 9th section were simply followed. In this case some selection has, in fact, been made. The following paragraph of the 9th section it is to be observed leaves to the Judge to give notice of the time and place at which he will proceed to hear the matter and as this language seems to me to show that, as the time is clearly not to be fixed by the Archbishop, neither is the place to be fixed by him in the narrow and strict sense of the word "place" contended for by the defendant.

I am therefore of opinion that none of these objections can be sustained even if they can be made. But I am further of opinion, that, if these objections can exist, they are unavailing in point of law. It is not necessary to give the Judge jurisdiction to hear, that every incident which gives the Archbishop, or in this case the Bishop, the right to send his requisition to the Judge should appear on the face of the requisition. Quite apart from an answer presently to be considered, the requisition appears to me abundantly sufficient. If it were not, I think its sufficiency cannot be questioned by the defendant in this form of proceeding. If the Judge is properly appointed, if the matter is within his jurisdiction, if he be called upon to act by a person who has jurisdiction to call upon him, if he has been called upon in fact, and if, as regards the defendant he has acted within his jurisdiction, the defendant cannot criticise and take objection to the instrument which has called upon the Judge to act. Such objections if available at all, might be available on the part of the Judge if he refused to act and this Court were to endeavour to compel him. No case has gone the length of saying that a person in the position of the defendant can question jurisdiction on grounds of this kind. There is no authority for any such a proposition, and I decline to make one.

The next objection, or rather series of objections, which arise in point of order, are the various objections which have been taken to the language of the monition and inhibition as not setting forth with sufficient particularity the various facts which must have existed to give the Judge jurisdiction to issue them. Much time and infinite ingenuity were expended upon this branch of the argument, and many cases were cited which but for an answer which I am about to give, it might have been necessary to examine in detail and at some length, but it is not necessary. I throw no doubt upon the general principle that Courts of limited jurisdiction must show, upon the face of the legal instruments they employ, the facts which give them their jurisdiction and which give validity to those legal instruments. I throw no doubt upon the existence or the importance of the power of this Court to compel such Courts to exercise their jurisdiction, if they decline; and to restrain them if they exceed it, but in this case I think that a higher power than this Court has intervened, and that the forms which I am now examining, and one of which I have already examined in the requisition, have each and all of them the sanction of Parliament. If that is so, it is useless to enquire how the matter would have stood if the forms employed had no such sanction. By the 19th section of the 37th and 38th Vic. cap. 85, it was enacted that the Queen in Council, with the advice of certain eminent persons, including the Lord Chancellor and the Lord Chief Justice of England, may cause Rules and Orders to be made for regulating the procedure under the Act. Such Rules and Orders are to be laid before each House of Parliament in the manner specified. If either House addresses Her Majesty praying that any Rules may be annulled, the word is important, the Queen in Council may annul such Rules, without prejudice to the validity of any proceedings which may have been taken under them. Rules and Orders under the section

have been made by the Queen in Council, and have been laid in manner specified before each House of Parliament. As portion of such Rules and Orders forms have been drawn up. Those forms, with an exception, trivial, but to which I will refer, have been followed in all the documents. I am of opinion so far as the Rules and Orders, including the forms, conform to the statute, and are not inconsistent with the statute, the Rules and Orders and forms have Parliamentary authority. It is said that the power to make Rules and Orders regulating procedure, does not include the power to frame forms which are procedure. It is said that the statute, having, as it has in more than one place, mentioned the form as to be prescribed by the Rules and Orders, must be taken to have intended that only such forms as are referred to were to be prescribed by the Rules and Orders when made. I can assent to neither contention. Not to the first for various reasons, forms are amongst the most important parts of procedure and, especially in Ecclesiastical matters, are the parts most requiring to be shortened and simplified by authority. In the analogous cases of the Court of Probate and the Court of Divorce, under words not to be distinguished from the words before me, forms have been drawn up which for twenty-five years no one has ever dreamed of disputing. The same thing has happened under the 15th and 16th Vic. cap. 76, section 223, the first part of it, the Common Law Procedure Act 1852. Nor does the fact that other statutes such as the 9th & 10th Vic. cap. 95, section 78, have given power to frame forms in express terms, appear to me to show that where words abundantly wide enough to give the power are used, their breadth is to be limited because other statutes under other circumstances have been more specific in their language. Neither can I assent to the second contention drawn from the words of the statute itself. The fact that the statute speaks more than once of the form to be prescribed by Rules and Orders seems to me conclusively to show that under the general power to frame Rules and Orders when used in the latter part of the statute, the power to frame these forms was already intended to be included; and though the observation be perhaps minute, it is yet true that in two cases, at least, where the forms are mentioned in the Act itself, they are forms hardly of procedure under the Act, for the first is the form of complaint to the Bishop which is a request to him to put the Act in operation, a request which he may grant, or refuse, at his absolute discretion; and the other is a form of Appeal when the procedure under the Act is over, and which, but for the Act, it might seem more proper that the Judicial Committee should prescribe. Moreover, if the power to frame forms is given by the statute, I am clear that these forms are within the power given. It is to my mind idle to suppose that nothing more was given than power to frame forms which should be good at Common Law. No Parliamentary power was needed to frame forms which should be good without such power. I have myself little doubt that the power was given for the very purpose of avoiding the minute objections and elaborate arguments to which we have been obliged in this case to listen. I come, therefore, clearly to the conclusion that these forms have Parliamentary authority and are binding on Lord Penzance. It is admitted that they have been followed, with two exceptions, to which I will in a moment advert. It is not suggested in point of fact Lord Penzance has in any respect done anything exceeding his jurisdiction. I think therefore, all the objections founded on the language of the requisition, monition and inhibition fall to the ground.

The two exceptions, to which I have alluded, remain to be considered. It is said that the requisition of the Bishop of Exeter does not exactly follow any form. Nor does it. The case of a Bishop and an Archbishop being both interested in the patronage of the living appears to have been omitted in the Act, and the form of the requisition. Therefore in this case follows the form, to use the words at the head of the appendix of forms, as nearly as the circumstances of the case will allow. The words "We have signified such failure to the said Archbishop" are admitted to be inaccurate in point of fact and are inapplicable to the case, but they may be rejected without vitiating the form, which remains perfectly good without them. Next it is said that the forms used do not follow the form given in the Rules and Orders and are not in accordance with the statute, for that they mis-describe the Judge and that he has in them affected to act as Official Principal of the Arches Court of Canterbury, whereas his jurisdiction under the Act is not that of Official Principal but only of Judge of the Provincial Court of Canterbury. In my opinion this objection fails also. When the Rules and Orders were first issued by the Queen in Council on the 28th of June 1875, the places of Official Principals of Canterbury and York were both full, and the proper style of Lord Penzance, the style given him in the Act, was Judge of the Provincial Courts of Canterbury and York, so he might have remained for many years if the Official Principals had neither died nor resigned. Accordingly the forms drawn up under that state of things called him by the only name he was then entitled to bear. But, by the resignation of Sir Robert Phillimore in October 1875, Lord Penzance became Official Principal of the Arches Court of Canterbury by the direct operation of the statute as I have explained at the beginning of this judgment. Thereafter that was his title; thereafter all proceedings before him became proceedings in the Court of Arches. Thereafter, all forms, which had heretofore run in his name as Judge of the Provincial Court ran by force of the statute in his name as Official Principal, and I think in this respect the note appended to Rule 65 of the Rules and Orders of 1875 was really unnecessary, and prescribed only what the law would have prescribed if there had been no such note. Not that proceedings though in the Court of Arches ceased to be proceedings under and limited by the statute, but that proceedings under and limited by the statute became statutory proceedings in the Court of Arches. The passage from the judgment of my brother Lush in *Serjeant* v. *Dale*, 2nd Queen's Bench Division, page 566, is capable of being construed as meaning no more than I have now expressed, and I have the highest authority, namely, his own, for saying that in his mouth it did mean nothing more. Sir Alexander Cockburn cannot tell us what he meant by his language in *Hudson* v. *Tooth*, 3 Queen's Bench Division, page 53, but he too may have intended to expound the statute as I have expounded it, and I think he did, because his language in respect of the Act, if pressed further would certainly be inaccurate, a thing very unlikely with him in any case, and, with the statute actually before him, all but impossible. I may say, in passing, that I do not presume to cast any doubt on the authority of these cases; both were in my judgment perfectly rightly decided but they have no bearing upon the present point. I think, therefore, that the objection to these documents so far as it is founded on any supposed mis-description of the Judge entirely fails.

I pass from these technicalities to the one point of substance in the case, a point well worthy of argument, and not to be decided without much consideration. It may in substance be thus stated:—This is a new and statutory

proceeding. The incumbent, if he is found in the wrong by the Bishop or the Judge, is to be ordered to do, or to abstain from doing certain things by monition from the Bishop, or the Judge, as the case may be. The 13th Section of the Act enacts that the monition shall be enforced by a new process of inhibition, and, if submission to the monition in the way pointed out in the 13th section is not made by the incumbent for three years, his benefice at the expiration of that time becomes *ipso facto* void. You cannot, it is said, look behind the statute. There is no power given by it to enforce obedience to the inhibition, and as far as the inhibition is concerned the Judge, or Court, has been left without any legal power. It may be that it was thought the inhibition would bind the conscience, but if it does not, then for three years, and subject to the penalty at the end of three years, the monition may be disobeyed and the inhibition defied. It is contended, on the other hand, that thus to construe the statute would be to bring a scandal on the administration of justice, to leave to the clergy only, of all the subjects of the Queen, the power of obeying or disobeying for three years, at their pleasure, the provisions of an Act of Parliament, that it is incredible that Parliament would have passed a special statute to enforce in a short and inexpensive way a certain uniformity of ceremonial, and yet have left the Court entrusted with this special duty without the power of doing the duty entrusted to it. These and the like considerations were pressed upon us with much force by the counsel who appear for Lord Penzance and for the Churchwardens. I am not insensible to considerations of this sort on either side; if the statute stood alone there would be, I think, much to be said. At first sight the 13th section seems to be complete in itself, and to enact the way, and the only way in which disobedience to the monition is to be enforced. Such, I confess, was my own first impression, not having been for many years familiar with Ecclesiastical disputes, and never having been familiar with them when the matters disputed about were the vestments of the clergy, and the particular postures or gestures which a clergymen might or might not assume or use in conducting the public worship of the congregation. It strikes me as possible and even probable, that Parliament might never have contemplated as reasonably possible that clergymen belonging to the Establishment would deliberately disregard and defy the law of their Society pronounced by the highest Court of Appeal in the country, and claim for disobedience to the law in matters such as this the sanction of conscience and the credit of virtue. For these are not the weightier matters of the law; judgment, mercy, and faith; but at the best and highest are points more or less interesting, of ceremonial observances, points on which, prior to experience, it would be difficult to believe any man could persuade himself that disobedience to the law was a matter of moral obligation. And as certainly the inhibition *pendente lite* under the Church Discipline Act, could only be enforced, if the clergy defied it, by a process so lengthy and so cumbrous that, practically, it could not be enforced at all. I should have been disposed to hold, if the statute had stood alone, that Parliament had not contemplated the possibility of disobedience and defiance, but had assumed that clergymen, like other men, would obey the laws of their country, and had not enacted any specific mode of enforcing obedience, which it took for granted would be rendered. But the statute does not stand alone; it follows the 5th Elizabeth, cap. 23, and the 53rd George III., cap. 127. The latter statute substituted the writ *de contumace* for the writ *de excommunicato capiendo*, keeping alive by express enactment many of the forms of the statute of Elizabeth,

and going on to contain these words: "In all cases which according to the laws of this realm are cognizable in the Ecclesiastical Courts, when any person or persons having been duly cited to appear in any Ecclesiastical Court, or required to comply with the lawful orders or decrees, as well final as interlocutory of any such Court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such Court, no sentence of excommunication shall be given or pronounced saving in the particular cases hereafter to be specified; but instead thereof, it shall be lawful for the Judges or Judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the Court shall have been committed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same, in the form to this Act annexed, to His Majesty in Chancery as hath heretofore been done in signifying excommunications; and thereupon a writ *de contumace capiendo*, in the form to this Act annexed, shall issue from the Court of Chancery." What may have been the intention of the Parliament which passed the 37th and 38th Victoria, chapter 85, I have no means of knowing, except from the Act itself. The Act has not excluded the operation of the Act of George III. Lord Penzance was made by the 37th and 38th Victoria, chapter 85, an Ecclesiastical Judge in an Ecclesiastical Court; there was a Cause cognizable before him, there was a person duly cited, there was a lawful order made, with which that person was required to comply. That person has refused to pay obedience to such lawful order. It seems to me to follow that by the plain and direct enactment of the 53rd George III. this significavit properly issued. I think this would have been so if Lord Penzance had remained only the Judge of the Provincial Court of Canterbury. It is none the less so according to the view I have already expressed, because since the passing of the Act the events contemplated in the 7th section of the Act have happened, and he has become Official Principal of the Court of Arches.

I have come, therefore, to the clear conclusion that the 13th section of the Act is not exclusive, and that the power to commit for disobedience to the inhibition exists in and has been properly exercised by Lord Penzance.

There remains the question whether the provisions of the 5th of Elizabeth expressly re-enacted by the 53rd George III. in reference to the writ *de contumace*, are still in full force. If they are, I cannot think that they are only directory. The case of the *King* v. *Holgate* in 1st Siderfin, and the case before Lord Cottenham in *re Barnes*, 1st Cray and Phillips, appear to me to be quite impossible to be reconciled with any such view, and whatever may be the weight due to the report of cases in Siderfin on points of law, the case I have referred to is very strong indeed, at least as evidence of what was then the practice; but I think the provisions of the statute of Elizabeth are no longer in force. Assuming that the writ *de contumace capiendo* issues out of the Petty Bag, as I believe all original writs did, I think the 12th and 13th Victoria, cap. 109, by necessary implication repeals so much of the Act of Elizabeth, and of the 53rd George III. chapter 127, section 1, as requires the *capias* to be brought into, opened, and allowed in Court. When that Act passed Trinity Term ended in June; all the interval between the 11th of June and the 2nd of November was vacation, during which the Court, that is the Court in Banco, could not sit; so that no proceedings of this nature could be taken between those dates. The 25th and 26th sections of

the Petty Bag Act are most explicit. All writs, of whatsoever description, may be issued and returned in vacation; the required interval of twenty days between the teste, and either the day named for the return, or the day of the actual return being preserved. The intention was to allow such proceedings to be taken and executed in vacation, at a time when there was no Court of Queen's Bench in which the writ could be opened and allowed. It follows that it might be executed without those formalities if the substance of the requirement is preserved, namely, that the writ be entered of Record in the Court of Queen's Bench, so as to give the Court jurisdiction over it. The two Acts cannot possibly stand together, and therefore the later one repeals *pro tanto* the earlier Act of Parliament. It is useless, I think, to say that if the first Act was *pro tanto* repealed, it certainly was not revived by the Judicature Act which abolished Terms altogether, and authorized though it does not require the Court to sit in the holidays and vacations.

For all these reasons it appears to me that judgment must be given for the Crown in the Rule in which Mr. Dale is defendant, and for Lord Penzance in the three other Rules in which he is defendant.

MR. JUSTICE FIELD: I have arrived at the same result, and I may say also by the same course of reasoning. The applicant Mr. Dale is the incumbent of a benefice within the jurisdiction and diocese of the Bishop of London, and he has obtained from this court a writ of habeas calling upon the officer in whose custody he is to return the cause of his custody, why he is personally restrained, and he has also obtained other rules in the shape of prohibition or supersedeas or by way of quashing, but all of them directed in substance to the same questions as his learned counsel has raised in the application for his discharge under the writ of habeas. I do not mean to say that they were all raised upon precisely the same ground, but more or less the same points are involved in the discussion of the questions on the first application, which is that he be discharged from the custody he is now in. Now the officer in whose custody he is returns that he has him in his custody because it has been signified to him, or he has a writ from which it appears it has been signified to the Court of Chancery that Mr. Dale has committed a contempt of the Court of which Lord Penzance is the Judge by wilfully refusing to obey a lawful order made by Lord Penzance in that jurisdiction; and I apprehend that the position of Lord Penzance constituted as he is a Judge of the Provincial Courts of Canterbury and York, and having become as he has the Official Principal of both those Provincial Courts, is that he does possess that amount of statutory jurisdiction and no more which makes it the right and duty of this Court to see whether or not the subject who complains to them that he is in improper custody is really vexed by that custody, because nothing is clearer than that it is the duty of this Court to examine into all proceedings of Courts. I purposely do not say of inferior jurisdiction, but which have limited jurisdiction conferred upon them by statute, and to see whether or not the jurisdiction of that Court has been exceeded. Now the contempt which is alleged in the writ is this: that Mr. Dale disobeyed an order or inhibition by which he was ordered to abstain from ministering within the diocese, and further it says that that inhibition was issued because Mr. Dale had previously disobeyed a monition ordering him to abstain from certain practices, from the performance of certain rites and ceremonies in the conduct of the public worship of his

Church, which Lord Penzance by his sentence had found to be contrary to the law of England.

Now, let it be thoroughly understood we do not sit here in any way as a Court of Appeal. We have no power to decide whether or not Lord Penzance has rightly or wrongly decided. If there is any ground for that, of which not the smallest ground has been laid in any shape or way or suggested, Mr. Dale's remedy would be that of every other citizen who feels unduly vexed by an unjust or improper sentence; he has the power of appeal open to him provided by statute. All that we have to do is to see that the acts which Lord Penzance has done are such as he had a right and authority to do within his jurisdiction.

Now, first of all, if the writ which has been returned to us truly and duly sets out all the requisite matters which go to found the jurisdiction of Lord Penzance to hear and determine the matter of the representation and to enforce obedience to his inhibition, and if all those matters are proved, so that everything has been rightly done, we have no power whatever to discharge Mr. Dale from the custody he is in. His mode of obtaining discharge from that custody would be that of every other citizen, namely, by submitting to the tribunal which has the power and right to require obedience to its orders. It is an observation which my lord has already made, and which I will repeat, for it seems to me most important that it should be thoroughly well known and understood that Mr. Dale has not from beginning to end of these proceedings alleged that any of the statements in the writ, or in any other proceedings, are untrue or unfounded in fact. He has made an affidavit in which he has set out the various notices of hearings and other matters which he has received, but he has not ventured in that affidavit to deny that anything has happened beyond the jurisdiction as matter of fact, or that any one of the statements contained upon the proceedings are thoroughly true and well founded. It must be taken therefore that the representation when made was duly forwarded to him by the Bishop, that he had the opportunity which the statute intended him to have of deciding whether he would submit to the jurisdiction of his Bishop or not, that the Bishop duly considering the whole circumstances of the case as it was his duty to do, and that so duly considering the whole circumstances of the case his Bishop came to the conclusion that he could not stop the proceedings, but that it was his imperative duty to transmit the representation to the Archbishop in order that it might be proceeded upon. Now it is certain also that under those circumstances the Bishop of Exeter had no other duty to perform, but to transmit the representation, or rather to require Lord Penzance to hear the representation. So that we find that in every necessary stage of these proceedings, Mr. Dale had every notice given to him. He might at any time, if he had so pleased, have defended himself against the charge that has been proved against him. He did not, however, in any way appear, or dispute, or deny the matters alleged, and at the last Lord Penzance heard and determined the cause, and pronounced his sentence that the representation was well founded. That having been solemnly done and decided by a Judge expressly appointed by the Legislature for the purpose of so deciding this very particular matter, Lord Penzance had no duty, and could do nothing else than issue his monition to the offending clerk, and monish him to abstain from the practice which he had found to be illegal, and might reasonably have expected obedience from the clerk to that monition; but Mr. Dale wilfully disobeyed that order, he would not abstain as he was told by a lawful Court, pronouncing a lawful

sentence, from doing that which that Court had declared to be unlawful. Lord Penzance, therefore, had no alternative upon application, but to issue the following proceeding, namely, the inhibition not to minister at all, as being the only mode by which the scandal of the services being performed in a Church in a manner not warranted by law could be by possibility reduced and prevented. That inhibition Mr. Dale again wilfully disobeyed. Then it is only in the last resort that Lord Penzance had recourse, as I say now, to the alleged powers of his office of Judge and Official Principal by imposing upon Mr. Dale the necessity of personal restraint.

Now let us consider what are the objections which Mr. Dale takes to these proceedings. He seeks to obtain his discharge on various grounds. I have carefully gone through them all, and I have very seriously and anxiously considered them, and have come to the same conclusion as my Lord, that they all fail. I also cannot help agreeing with my Lord that all but one are in substance technical points. To decide in favour of them would work that injustice which we are bound not to administer. To decide against them is our clear duty. I cannot help also expressing regret that such objections should be made and should be urged in a matter, which go in no shape or way to the justice or injustice of the case. It cannot be pretended for a moment, or alleged for a moment, that the Bishop of Exeter did anything that he ought not to have done; that the Bishop of London acted in any way corruptly in 1876, when he came to the same result as the Bishop of Exeter did on the present occasion. Nothing of the sort can be alleged or said, but some critical minds have exercised their talent and ability in endeavouring to find something or other upon which, by right or by wrong, the object which they wished to attain, namely, the discharge of Mr. Dale from these proceedings, can be obtained without having any reference to the question whether in point of substance any wrong whatever had been done.

Now the first point that is taken is this. He says (I will take it chronologically in the sequence of time) that Lord Penzance had no jurisdiction to pronounce the sentence he did, or to issue the monition or inhibition in question, because he had never been lawfully required so to do under the ninth section of the Public Worship Regulation Act. Of course, in this particular case, a representation had been made of certain offences, if I may use that word—of certain things at all events—alleged to have been done by Mr. Dale contrary to the provisions of this Act, and the persons making this representation, the churchwardens of the parish, originally forwarded it to the Bishop of London. That was in 1876, and it is quite clear from the report of the case *Serjeant* v. *Dale*, it is stated so as a fact that on that occasion that representation was forwarded to Mr. Dale, and he was invited to say whether he would submit upon that or not, but he did not then submit or appear in any way, but after judgment had been pronounced, after sentence had been pronounced, he then discovered that the Bishop of London had an interest—a remote interest, not direct, in the living of which Mr. Dale was the incumbent, and that therefore the acts of the Bishop of London were entirely and absolutely void. Now it was not pretended, or thought for a moment, that the Bishop of London had really come to an unjust conclusion in the matter before him on account of his interest, but still there is no doubt that there was such an interest as by the law of England disqualifies anybody having it from exercising judicial functions, and a very salutary and wholesome rule it is. The amount of interest, and the fact that the Judge is uncorrupted and incorruptible, does not come into the question at

all, because the law looks with such distrust upon an interested Judge, that, whatever may be the amount of the interest, the fact is enough to disqualify all his judicial acts. Therefore after all the expense had been gone through, after Mr. Dale had been cited, and the whole matter had been heard, Mr. Charles comes into this Court, acting for Mr. Dale, and doing his duty for him, and asks successfully that every proceeding may be quashed upon the ground of this particular interest. Lord Penzance had been the judge who had decided in that case. The Bishop of London had done nothing but simply say "Let it go on;" and yet, although the judgment was a considered judgment of Lord Penzance, upon the ground simply that the Bishop of London had that slight interest in the matter all the proceedings were quashed. What happens next? Mr. Dale continues. He has already had the sentence of a Judge against him, but that sentence ceases to have any force. Mr. Dale continues the mode of worship of which that matter complains, and the churchwardens of the parish, who would no doubt have a duty in the matter, for they are particularly referred to in the statute, are obliged in 1878 to repeat the representation which they had made in 1876. But by this time it had been discovered, not only that the Bishop of London was interested, but also that the Archbishop of Canterbury had also a remote interest in this living, therefore it was very properly decided not to permit any risk to be run of the validity of the proceedings in consequence of either the Bishop of London, or of the Archbishop exercising any judicial functions in the matter by resorting to the provisions of the 16th section of the Act, by which, in the events therein specified, Her Majesty might by her sign manual appoint an Archbishop or Bishop to act in the place of the Archbishop, in all matters thereafter arising in relation to such representation. Now, what happened upon that was this. Her Majesty appointed a Bishop, the Bishop of Exeter, absolutely uninterested in this matter, by her sign manual, to be the Judge in the place of the Archbishop, and in the language of the appointment also of the Bishop, and then it is alleged that that appointment is bad, because it is said one Judge, one Bishop could not act for two persons who have two distinct duties to perform. It seems to me that there is absolutely nothing whatever in the objection. The duty of the Bishop of London was to consider the circumstances of the case, and then, if he thought it should go on, to forward it to the Archbishop. As was pointed out in the course of the argument, if the Archbishop had not also been disqualified by interest, he would have had to have done the very same two duties that the Bishop of Exeter had to do.

He would have had to have done the duty of the Bishop of London in taking the whole circumstances into his consideration and he would have had to have done the duty of the Archbishop of requiring the Judge to hear. Mr. Charles was asked once or twice why and on what ground this thing was impossible. The best and only answer he could give was that it seemed to him from the language of the section that the legislature had not got this particular thing in view when they prepared it, a consideration which is utterly immaterial provided the language of the section is enough to include the point in question. To my mind it clearly is, and therefore it seems to me that objection fails entirely.

But then Mr. Dale says, if that be so, still Lord Penzance had no jurisdiction, because the Bishop of Exeter has not in his requisition to the Judge alleged that the representation had been sent to him or that he had been required to state his willingness to submit to the Bishop, and also that it

contained no representation about notice to Mr. Dale. Now upon the construction of that instrument I am inclined to think there does appear a sufficient statement that the representation had been sent to Mr. Dale and that he had failed to signify his submission to the Bishop. But I am very clearly of opinion, however that may be, that I know of no authority, nor has any been cited, nor has any principle been stated which rendered any such allegation in such an instrument so material that the omission of it vitiates the whole proceeding. It is quite true that in the case of convictions, orders of Justices or sentences, or any judicial determination made or come to by any tribunal with limited jurisdiction, that all the facts necessary to give jurisdiction must appear. A great many cases were cited in support of this doctrine. It is well established and it was not denied at the Bar. But no authority was cited to show that any such rule extends to such a proceeding as a Bishop requiring the Judge to hear and determine under the statute. It is not a proceeding communicated to the parties in which it is necessary for them to act, or that they should see whether or not the jurisdiction claimed exists or not. It is a matter solely for the Bishop, who decides that the matter is to go on. It is a matter solely for him, and for the Judge whom he requires to proceed, and if those two persons are satisfied with the form and mode in which the judgment of the Bishop requiring the Judge to hear is stated, I myself am at a loss to see upon what ground it can be said that every subsequent proceeding in this matter is to be considered as null and void. That objection also fails to my mind as being unsubstantial and highly technical.

But then says Mr. Dale, you committed another thing, you have done something else which renders your whole jurisdiction void, that is, the Bishop has, not the Judge, he has omitted to state the place at which the hearing is to take place. Now it is remarkable the words of the section are that "he shall forthwith require the Judge to hear the matter at any place within the diocese or province or in London or Westminster." The words of the representation of the present case follow the words of the Act, except that he has also followed the form given by the rules by omitting the province as one of the places within the limits of which the matter is to be heard. The question then is, is that sufficient? Now, those words of the Act have been already the subject of Judicial decision. In the case of *Hudson* v *Tooth*, so often referred to during the argument, the Archbishop had used identically the same terms as the Bishop has here, but Lord Penzance having heard the matter at Lambeth, which although in the province, and so a place within the terms of the Act, was yet not in London or the diocese thereof or in Westminster, it was consequently held with the greatest reluctance, that the hearing under those circumstances was at a place not within the jurisdiction conferred upon Lord Penzance by the requirement, although it might have been, and was within his jurisdiction, had he been acting merely as the Dean of Arches or Official Principal, and consequently in that case no doubt the hearing took place at a place beyond the jurisdiction of the Judge. But in the present case nothing of the kind has happened at all. The hearing took place here, at a place clearly within the jurisdiction of the Judge and as conferred upon him, or created, or brought into existence rather, by means of the requirement. It is a place in which he clearly had jurisdiction, but it was said that Mr. Dale was not bound to apppear because the Bishop had not named some more particular place within those limits. That does not appear to me to be necessary either by the language or the intention of the

statute. Before that statute became law a clerk could not be cited out of his diocese. It seems to me the legislation was intended by the statute to be this, to render him amenable to the new tribunal which might, probably, more conveniently for the public, and probably also for the parties, hold its sittings elsewhere. I do not think it meant to leave the entire selection to the Judge himself. It intended that the Archbishop or Bishop should fix the limits within which the matter should be heard and that the Judge should fix the place within those limits at which he would hear it. The following words of the same section strongly point to this conclusion because immediately following occurs this language,—"The Judge shall give not less than 28 days' notice to the parties of the time and place at which he will proceed to hear the matter of the said representation." That apparently imposes on the Judge the duty of selecting the place. Had it been intended that he was to be fettered by some narrower limit to be imposed upon him by the Archbishop, surely the language would have been "shall give notice of the time and of the said place at which he is to be so required to hear." But this matter although not the subject of decision seems to be almost practically concluded by the languages of the Judges in the case of *Hudson* v *Tooth*. In that case the language being identically the same I find the learned counsel who argued here to day are represented as saying this "that this requisition is the foundation of the jurisdiction, and here he has exercised his discretion in an apparently reasonable manner and in accordance with the old practice, and limited the place for hearing to the diocese." Lord Justice Lush uses this language:—"So that while the Archbishop appoints the limits within which the hearing shall be restricted, the Judge appoints the particular place." It seems therefore to me that the requirement here fixing as it does the limits within which the hearing is to take place, it is for the Judge to say at what particular place within those limits it would be most convenient in the interests of all the parties that the hearing should take place.

Now I come to a series of objections which depend upon the construction of the particular instruments in the case. It is said next that Lord Penzance had no jurisdiction to signify the contempt because in the monition and inhibition his title is given to him as Official Principal and not given to him as Judge. It seems to me that point also entirely fails. By the Act he was made the Judge of the Provincial Court of Canterbury, and by that same Act when a particular event occurred, which has occurred, he became the Official Principal of the Arches Court of Canterbury, and by the same Act all the proceedings under the new jurisdiction were to be deemed to be proceedings in the Arches Court of Canterbury. Before any order of this kind was made, he had so become the Official Principal of the Arches Court of Canterbury, and I can see no ground whatever for suggesting that the form used was not exactly right in every way, because having first of all become Judge of the Provincial Court, he next became Official Principal, and then in all the instruments after that event had happened, surely the proper way of describing himself, is by his title which he holds, the office of Official Principal and Dean of the Arches. The assertion made is almost, I was going to say, too ungrounded to advert to, and that is that on reading the instruments it may have been supposed that Lord Penzance was acting as Official Principal in 1870, having been appointed in 1870. It is so clearly contrary to the very language of the Act that any such supposition could exist, that one can hardly regard the objection as being seriously made. Independent of the construction of the statute my Lord has referred to the rules and the binding effect of

them and the alterations which are suggested as soon as the event should happen which has happened, and with all those observations I so cordially concur that I do not think it at all right or necessary to go over the same ground.

Now the next objection is one still more astounding than the others, and it is, that if he is taken to be acting as Official Principal by reason of all these titles and descriptions of him in these instruments he has never been a valid Official Principal at all, and that every act of his that is not completed has been void from the beginning and may be stopped at any moment in course of completion on the ground that he has not taken the Oaths prescribed by the 127th Canon. Now I am inclined to agree with my Lord in thinking that he is such a Judicial Officer having judicial functions to perform as would have brought him within the canon had he been appointed in the ordinary way.

What the effect would have been it is by no means necessary now to discuss or consider. No authority, except the case of *King* v *Verelst*, was cited to shew that even if it was so, the omission to take the oath in the form required would vitiate all the proceedings; but I am very clearly of opinion that under all the circumstances of this case Lord Penzance was under no such obligation whatever. He was by the Act made *de facto and de jure* Judge of the Provincial Court of Canterbury, and the legislature thought it right to entrust the appointment of such person as the Archbishop should appoint provided he were a member of the Church of England. It required no other qualification, but of course his being within the particular rules; but it required no other ceremony, no other confirmation or consecration of his authority by oaths but simply the declaration that he was a member of the Church of England, and then the statute expressly enacts having done that as to which there is no doubt at all. Lord Penzance did perform what he was required to do, and so, having been entrusted by the legislature with very high and important judicial functions, it was absolutely unnecessary for him to go any further or to take any other step of any sort or kind. The legislature by virtue of the appointment and by virtue of the sign manual of the Queen made him a Judge of the Court, and then being a Judge of that Court, it made him without any further step whatever ex officio actually Dean of the Arches and Official Principal. That point therefore seems to me equally without foundation.

Now the next objection is one that when this case was moved before me and my brother Manisty did seem to me to open up a very serious objection. It was alleged that all these proceedings are void because being as it was said proceedings of a Court of limited jurisdiction they ought to contain in accordance with the rule I adverted to before all the conditions averments and allegations, all the conditions precedent necessary to support the jurisdiction and to shew that it was actually come into operation. It appeared to me to be a very formidable objection, because I think it is a matter of substance that Courts with limited jurisdictions should be required so to state upon their proceedings as facts all these different steps. It is clear that they cannot falsify by stating untruly those facts, and it seems to me important that they should be held to the rule of stating them unless they have been released by the legislature. In this case I have come to the same conclusion as my Lord that they have been so released. He has very clearly and carefully gone through the sections under which the forms were made, every one of which has been followed as honestly and as fully as it was possible for the Judge to do. My Lord has come to the conclusion and I agree with him that these

Canons are a sufficient justification for everything that has been done. Indeed, consider for a moment what would otherwise have been the case. The legislature says we will appoint certain learned persons to settle the forms in which these proceedings may be done, and we will have those forms declared valid unless Parliament interferes to the contrary; and yet when the subject and the tribunals, the one applies for and the other acts upon the legislature form so given, the party dissatisfied is to turn round at the last moment and say I am not bound by them, you are not bound by them, they all were delusions, they don't in any way do what you suppose they do, all that they mean is that you are still to go on setting out at any amount of length every condition precedent that an acute mind can suggest, and that in default of them you are entitled to treat all the proceedings as void. Let it again be remembered that none of the proceedings, the defect of which is alleged as a ground of these objections really and truly did not take place, on the contrary, each and every one of them took place exactly as it ought to have been according to the Act. I come now to the last serious objection which is no doubt one of very considerable difficulty, and that is the serious contention made by Mr. Charles and the other learned counsel for Mr. Dale, that Lord Penzance had no power under the circumstances of this case, or by virtue of the jurisdiction conferred upon him by the statute to signify Mr. Dale's disobedience to the Court of Chancery. I am bound to add that I was very much struck with the argument which was addressed to us by Mr. Charles in the first instance upon that point, and it was not until I had heard the very clear and able arguments addressed to us on the part of Lord Penzance and of the party representing in this case that I was able to come to the conclusion that I have done, but I have come to it very clearly. I entertain now in my own mind no doubt about its correctness. It rests upon a careful consideration of the Act under which Lord Penzance has his powers, and arising upon, to my mind, the almost impossibility of coming to the conclusion that the legislature could have intended in that Act not to have given Lord Penzance either as Official Principal or Judge of the Provincial Court of Canterbury the power which he has exercised on this particular occasion.

Now let us look at the Act. It speaks for itself, and it will tell us what was in its mind and what were its intentions at the time it passed. At this time almost the only Act—indeed I may say the only Act—in force applicable to matters of this description, was the Church Discipline Act, 1840. That, as is well known, dealt with all Ecclesiastical offences, and among other things the three particular matters specified in the 8th section of this Act would no doubt have ranged themselves under that head. They would have been, and they are, for the statute has in no way repealed the Act of 1840; they were therefore and are still Ecclesiastical offences within the meaning of that Act. But in that Act Ecclesiastical offences have a much wider scope. It included criminous charges against a clerk. It included serious doctrinal or other errors of faith, and it also included three particular matters which are set out in this Act. Now as a matter of history one knows that before the passing of this Act a great many doubts and questions had been raised in this country as to whether or not certain ceremonies or the wearing of certain vestments or habits, or the adornment of churches in a particular way, were really or were not in accordance with the law, and there was a great deal of natural interest excited, and a great deal of matter which caused heart burning and was painful to see, and witness, and hear. That state of things it seems to me, by the Act of Parliament, the Legislature clearly

intended to deal with and with that only. They left the whole jurisdiction of the Court of Arches standing for all other purposes and even for the purposes here. They left the Judge of the Court, they left the Court itself with all its powers still standing, but they selected these three particular matters, and with what object? Let us look at the Preamble of the Act to see what their object was. The title of the Act was this, "For the better administration of the Laws respecting the regulation of Public Worship." It was not in any way altering the law, or making any new laws, but simply for the better administration of the laws, and it recited "that it was expedient that in certain cases further regulation should be made for the administration of the laws relating to the performance of divine worship according to the use of the Church of England." It was therefore the regularity, if I may use the term, the uniformity, at all events, of the performance of divine worship which was in the view of the Legislature, and the only proper performance of Divine public worship of the Church of England was according to the laws of England to be regulated and administered by this Act. It was for regulating, or putting into the course of regulating and preventing, I was going to say almost the scandal of having worship in one particular church conducted upon altogether different principles from that in another, and from having the views of the ministers as to the mode of performing worship in opposition to those of the congregation, or in the other way. The object of the statute, as it seems to me to speak plainly for itself, is that all these matters ought to be taken out of the category of offences against the laws Ecclesiastical, and might be dealt with in a different way, in the hope that by so doing these differences, difficulties, and doubts might cease. Accordingly that being my view of the intention of the statute, it first of all proceeds to affirm that all the proceedings now in force shall remain because another section, the 3rd section, refers to the proceedings under the former Act, and says "that proceedings taken under this Act shall not be deemed to be such proceedings as are mentioned in the Act of the 3rd and 4th years of the reign of Her Majesty, chap. 85, sect. 23," by which section it may be recollected that no other proceedings should be taken in any Ecclesiastical Court otherwise than in conformity with that Act. Consequently it is clear that it preserved the remedy over the subject matter of the representation, and if the parties had proceeded under this Act nothing can be clearer than that the same Judges sitting to hear the cause and coming to the same conclusion, and making the same order and the same monition would unquestionably have had the power of contempt which Lord Penzance is called on to exercise on this occasion. Now that being so, what the statute next does is this. It appoints a different mode of procedure. Instead of having a charge made against the incumbent it makes it a matter of representation that something has occurred. It then creates first of all a species of domestic tribunal, because it gives the Bishop (the representation being made to the Bishop, and the Bishop communicating with the clerk) if the parties will consent, the power to at once dispose of the matter without any further appeal, but if the parties do not consent, then it directs the Judge to be appointed by the Archbishop, with the approval of Her Majesty the Queen, to hear and dispose of all the matters so brought before him. Now the power of the Bishop is first of all this, that he having heard it may issue a monition, and the power of Lord Penzance also is this, that he may issue a monition. Then arises at once the great question, What powers have the Bishop or had Lord Penzance to enforce that monition to compel obedience

to it? Had it been a proceeding under the Church Discipline Act no question whatever would have arisen. The great difficulty which has arisen here has arisen in consequence of the language of the 13th section, because that language implies what Mr. Wills seemed to think was the true construction that for the purpose of enforcing obedience to the monition no other course was open to the Judge except to issue the inhibition, which he has done in this case. That seems to me to be the true construction of the Act; then it is clear that the object of the Act was to enforce obedience to the monition, it was that which was to be the subject matter which the incumbent was to obey, and it was assumed by the Legislature that that would be secured by the process which it has adopted in section 13, because the Legislature says obedience to the monition shall be enforced if necessary by an order inhibiting the incumbent from performing any service within the Church. Then it proceeds to say that if that inhibition remain in force for the period of three years, the benefice shall be absolutely void, and that the patron may then appoint as upon a void benefice, but it provides no particular machinery for executing or carrying into effect or enforcing obedience to the inhibition. There it is that the first difficulty arises. Now undoubtedly, in order to see that the Legislature has intended that the liberty of the subject should be restrained, it ought to be seen by either express words or clear and necessary intendment. I cannot say here that I find any express words, but I do find what satisfies my mind that such a result was within the object and the intention of the Legislature. If not, what is the consequence? The inhibition was intended to act upon the conscience and mind of the incumbent, so as to induce him to pay obedience to the monition. If the contention of Mr. Charles and the learned Counsel for Mr. Dale is right, that inhibition would lose all its force, because it is said that notwithstanding the inhibition the incumbent may go and do everything he is inhibited from doing, and that he may wait up to the last moment before the three years have expired continually refusing to do that, and that therefore it is a matter of almost indifference to him whether he obeys the monition or not. It is said that that being so, there is absolutely no power whatever to carry out the acts of the Court in issuing the inhibition. But it is quite certain that the Legislature when they passed that Act, knew perfectly well, and had present to their minds the Church Discipline Act of 1840, for it is recited. They knew perfectly well that the power, and the most ordinary power exercised by the Court under that Act, was the process of contempt, which is given by the Act of George III. It is given expressly in the strongest possible language, that in all cases which according to the laws of this realm are comprisable in the Ecclesiastical Courts, that any person or persons having been duly cited to appear, or been required to comply with the lawful orders or decrees, as well final as interlocutory, of any such Court shall neglect or refuse to appear or neglect or refuse to pay obedience to such lawful orders, then the process of significavit may issue. Now that language is remarkable and very strong, and it seems to me very remarkable and strong with reference to this particular matter, because here you have a statute which is passed for the purpose of regulating the administration of Public Worship in England, of keeping it all in one channel, of creating a status, if I may use the word, of worship, a model. Now is that to be done except by admonishing the clerk first of all to abstain, and if he refuses, finding some process for compelling him to. Otherwise you have all the evils which the statute contemplates, going on for a period of three years in one church, and you may have, for aught I

know, the same process going on in twenty or thirty other churches in the same diocese, so that, instead of having the public worship regulated by the Act so as to be according to the laws of England, as declared by the sentence of a Judge of proper Ecclesiastical jurisdiction, you would have services going on for all that period in contempt and violation of the order which has been made solely and expressly for the purpose of carrying it out. It has a power also which is not given to these Courts in exclusion of other Courts. All other Courts of the realm have power to enforce their orders; all Courts have jurisdiction to enforce their orders by process of attachment or imprisonment, if the litigant subject do not obey. The injunction to do an act, or to refrain from doing an act, or an order to do an act, are all of them proceedings of an exactly similar character to the proceedings in the present case. There is no Court that I know of, there is no Judge in Chambers that I know of, who would hesitate, if his orders to perform a particular duty of any kind, or do some particular act, are wilfully and deliberately disobeyed by the person upon whom that duty is enjoined, to attach him for that disobedience. The restraint of personal liberty is no doubt a serious thing; at the same time there is no other mode that I know of to which obedience to the lawful orders of a Court can be enforced. It is perfectly clear to my mind that the Legislature well knew, and understood that that was the mode by which the proceedings under the Church Discipline Act might be so enforced, and when therefore they were silent as to the mode of enforcing the inhibition, I come necessarily to the conclusion that they were so silent because they understood that in appointing Lord Penzance, or the new Judge whoever he might be, Official Principal of the Arches Court, they clothed him with all the authority necessary to enable him to secure the execution of his decrees. In point of fact, although there was a new jurisdiction, I read it that that new jurisdiction was attached to an old one; that it was to be performed by an old jurisdiction, and to be performed and surrounded by all the powers with which that jurisdiction was clothed.

For those reasons therefore I come to the conclusion that the process of contempt was applicable to the present case, and therefore on that ground there is no reason for discharging Mr. Dale from the custody he is in.

With regard to the other remaining grounds, they are of the slightest possible description—they are technical in the highest possible degree. My Lord has dealt with them and my brother Manisty has communicated to me what he proposes to say in reference to them, and with those remarks I cordially concur. Of course I need hardly say it is a matter on the one hand of regret to be obliged to remand a gentleman like Mr. Dale into custody, but, on the other hand, obedience to the law is the great principle that, that which is law, is law finally and for everybody. If any one man or any class of men are entitled to come and say, I disapprove of this law; I do not like it; it hurts me and my feelings; I will not act upon it; why, what security would there be for the equality of any body before the law? What security would there be that numbers of persons might not escape under such a pretence as that? When the legislature has so recently declared as it has done within the last six years—for six years have not passed over our heads since the legislature declared that these things were to be done in the way in which they have declared them to be done—upon what ground can any man of conscientious mind say he will not obey that law, I am at a loss to understand. Therefore, although it is with pain, I concur in the sentence of remand. I do it also with the feeling that obedience to the law is the duty of everybody, be he lay or spiritual, and

inasmuch as, by signifying his obedience to the law, Mr. Dale can at the first possible moment be discharged from that custody, the first feeling of regret I had is entirely done away with, and I feel that I am only doing my duty in enforcing the law upon him, as I would anybody else.

MR. JUSTICE MANISTY: If time would have permitted and I had had the opportunity and the advantage of hearing the two judgments which have been pronounced I should not have thought it necessary to go so much at length as I have done into this matter, but it was right and proper that this judgment should have been delivered at the earliest possible moment, and time has not admitted of that interchange of judgments which might have saved me a great deal of trouble and the Court a considerable amount of time. That is my excuse for to some extent, though I will endeavour to do it very shortly, repeating what has been said.

Now I pass by a great deal. It is not denied and it could not be denied that the alleged offences (I do not feel any delicacy on that point, I call them by their right name) against the Ecclesiastical Law, which it is to be remembered is one branch of the law of England, have been committed, but it is contended that some of the proceedings were informal and bad on the face of them in not sufficiently stating facts which showed jurisdiction, secondly on the ground that on the face of the proceedings Lord Penzance who was and is the Judge of the Provincial Court of Canterbury and *ex officio* the Official Principal of the Arches Court of Canterbury exceeded his jurisdiction and consequently Mr. Dale is entitled to be discharged.

Now a representation having been made to the Bishop of London on the 12th of July 1878, by the Churchwardens of Mr. Dale's parish pursuant to the Act of 1874, to the effect that he had been guilty of twelve offences against the Ecclesiastical Law, each of which was specified, the case came on for hearing before Lord Penzance in February, 1879. His Lordship adjudged Mr. Dale to have been guilty of eleven of these offences. Mr. Dale did not appear at the hearing nor at any time during the proceedings. I shall not add anything to what has been said by my Lord Chief Justice and my brother Field as to the validity of the proceedings anterior to the hearing of the case and the Judgment pronounced by Lord Penzance beyond saying that I entirely concur with them in holding that those proceedings were regular and valid.

The first proceeding upon which I desire to make some remarks is the Monition. Two objections are made to it, one that Lord Penzance is not correctly described in it, the description given being that of Official Principal of the Arches Court of Canterbury, the other being that the Monition does not sufficiently show on the face of it that Lord Penzance had jurisdiction to issue it. Now with reference to the first of these definitions it is necessary to consider what office or offices Lord Penzance filled at the time he heard the case and issued the Monition. That was on the 21st of February 1879, and that is an important date. It is important in this, that the first set of rules came to an end on the 22nd of February, the very day after this Monition was issued, and a new set of rules came into operation on the 22nd. In 1874, Lord Penzance was duly appointed a Judge of the Provincial Court of Canterbury. At that time the Official Principal was also a Judge of the Provincial Court of Canterbury. In October 1875, he became by virtue of the Act of 1874 on the resignation of Sir Robert Phillimore *ex officio* Official Principal of the Arches Court of Canterbury. Now the Arches Court of Canterbury, was and it still is the

Provincial Court of Canterbury, and the Official Principal of the Archbishop or his substitute was prior to the time of Lord Penzance's appointment the only person who could administer justice in the Court. The Provincial Court of Canterbury got the name of the Arches Court in this way: there was an officer of the Archbishop called the Dean of the Arches, he had a limited jurisdiction over thirteen peculiars of the Archbishop in the City of London, they are now abolished. He was often the same person who held the office of Official Principal. This person either as Official Principal when he held both offices or acting as substitute for the Official Principal when he held the office of Dean of the Arches only, and to hold his Court in Bow Church in the City of London, which had a steeple raised at the top on stone arches, hence the Judge who administered Justice in the Provincial Court of Canterbury came to be called and known as *officiis de arcubus*, and the Court itself was called *curia de arcubus*. A wrong notion thus obtained that it was the Dean of Arches as such who had jurisdiction throughout the Province of Canterbury, whereas the jurisdiction of that office was limited to the 13 peculiars of the Archbishop in the City of London, and the jurisdiction throughout the Province for receiving appeals and the like belonged to the Official Principal only. This accounts in my opinion for the language used and the provisions made in the Public Worship Regulation Act of 1874. So long as the office of Official Principal was held by Sir Robert Phillimore, so long also the new or additional Judge of the Provinical Court of Canterbury appointed under the Act of 1874 was called Judge of that Court, but when the office of Official Principal became vacant, as it did on the resignation of Sir Robert Phillimore in October 1875, then the Judge appointed under the Act of 1874, became by virtue of that Act *ex officio* Official Principal of the Arches Court, and thereafter by section 7 of that Act proceedings before him were to be deemed to be taken in the Arches Court of Canterbury, consequently his proper style after he became Official Principal was that of Official Principal of the Arches Court of Canterbury." By that style Lord Penzance is described, and in my opinion properly described in the monition. It is dated the 21st of February 1879, and runs thus "James Plaisted Baron Penzance Official Principal of the Arches Court of Canterbury to the Reverend Thomas Pelham Dale, clerk &c. Greeting." It recites at length the Judgment pronounced at the hearing of the representation made in pursuance of the Act of 1874, and it is sealed with the seal of the Arches Court of Canterbury, and countersigned by the registrar of that Court, showing unmistakeably the character in which Lord Penzance was acting. But it is said that in the form given by the rules and orders made in June 1875, in pursuance of the 19th section of the Act of 1874, Lord Penzance is described as a Judge of the Provincial Court of Canterbury, and that consequently he ought to have been so described in the monition which was issued in February 1879, when those rules and orders were in force. To this I answer that by a note at the top of those rules it is stated that in the event of the Judge becoming Official Principal of the Arches Court of Canterbury these rules and the forms prescribed shall be applicable *mutatis mutandis* to all cases thereafter arising, such necessary alterations in the style of the forms being made as the Judge may direct. I do not think this note did more than direct that to be done which the Act itself required, but it shews the view entertained of the matter by the eminent and learned persons who made the rules. In my opinion that objection fails entirely.

Now as regards the second objection, namely, that this monition did not

sufficiently shew jurisdiction on the face of it, I think it also fails. The monition issued by Lord Penzance is in the form settled by the late Lord Chancellor, Lord Cairns, and the late Lord Chief Justice of England, Sir Alexander Cockburn, as well as by Lord Penzance and the Archbishops of Canterbury and York and the Bishop of London. It was approved by her Majesty with the advice of her Privy Council, and was tacitly approved by both Houses of Parliament, and nevertheless we are called upon to say it is insufficient and bad on the face of it. I decline to do so for the reasons stated by my Lord and my brother Field; but I am inclined to go further and to hold that at Common Law, irrespective of rule 22 and form 19 of June, 1875, the monition stated facts which sufficiently shew on the face of it that Lord Penzance had jurisdiction to hear the case and issue the monition. It states that a representation had been made by the Churchwardens and heard in pursuance of the provisions of the Public Worship Regulation Act, 1874, and that the defendant had been adjudged to have offended against the statute, laws, constitution and canons of the Church of England, in respect of eleven matters alleged in the representation, and which are specified in the monition. Then it commands the defendant to abstain and to refrain for the future from doing the things complained of which are again specified. One would have thought, as the eminent and learned persons thought who framed the rules and forms, that this sufficiently showed jurisdiction to hear the cause and issue the monition, but it is contended, on the part of the defendant, that the monition ought at Common Law to have set forth all the anterior proceedings. I put the question distinctly at the time of the argument, Where are you to stop—are you to go back to the commencement? and the answer I received from the bar was, Yes—you must go back to the commencement, commencing with the appointment of Lord Penzance as Judge of the Provincial Court of Canterbury, and his compliance with the act by making the declaration prescribed by section 7; the vacancy in the office of Official Principal of the Arches Court of Canterbury; the taking of the oaths required by the 127th canon of 1603; the fact of the Bishop and Archbishop being interested as alternate patrons of the benefice; the appointment of the Bishop of Exeter in the place of the Archbishop in compliance with the 9th section of the Act to which I shall only advert and not go through in detail, for it contains several matters all of which it is said must be stated, and stated to be complied with, and the failure of the defendant to submit to the decision of the Bishop of Exeter without appeal, and several other things which really are too numerous to mention. A number of authorities were cited in support of this contention, but none of them, in my opinion, go the length contended for. Now I do not intend to go through those authorities at any length. I do not intend, as it is said, to review them, but as this case may go before another tribunal, I have thought it right in case we should be wrong upon the first part, upon which we all agree, to shadow forth and enunciate the view I take of the matter, that this is perfectly good at Common Law. I do not infringe at all the great principle which has been adverted to that this Court is a Court having limited statutory jurisdiction. I adopt it in its entirety, but I say that, being a Court having limited statutory jurisdiction, it is in my opinion, when it comes to be considered what is the meaning of a superior Court within the meaning of the cases which have been adverted to whenever that question is raised and argued, I may be wrong, but I venture to think it will be found that the Court, as now constituted, having regard to its character and constitution, is one of the superior Courts to which credit is given, which is not

given to many inferior Courts. Now I will very briefly mention the cases. The first case is the *King v. Bagshawe*, in 7th Term Reports, page 63. That was the case of the Trustees of a Turnpike Road who had power to divert it through private grounds, making compensation to the owners, and in these terms; if you exercise that power you shall give notice to the owner to come and endeavour to settle the matter and treat with you, and if he does not, then you may have a Jury and have the matter assessed by a Jury but without stating that they had ever acted upon that simple condition precedent to the summoning of a Jury, they summoned a Jury and had the amount assessed. It was held that that was bad on the face of it, and I should think anyone would agree that that was common sense.

Now the next case was the case of *Harrison v. Wright*, in 13 Meeson and Welsby. That was the case of an Interpleader Order, which could only be made by consent. It did not state that it was by consent, and without consent it was a nullity. That again seems to be perfectly common sense. Then comes *Christie v. Unwin*, which was so much relied upon. That was the case of an order made by the Lord Chancellor, and I agree that in this respect it is utterly immaterial whether it is the Lord Chancellor or whether it is by this Court, or whether it is any other Court with limited jurisdiction. In that case the Lord Chancellor acting in Bankruptcy had the power in certain cases to substitute one petitioning creditor for another, but the petition did not show and the adjudication did not show that the person proposed to be substituted was a creditor whose debt was not anterior to the debt of the creditor upon whose petition the adjudication had been made. Although it was recited that he was a creditor not anterior to the creditor who had petitioned in the first instance, yet it might have been and probably was the case inasmuch as it was not stated in the petition that that state of things did not exist at the time of the petition, and there is no allegation whatever that at the time of presenting the petition that person was a person whom you could appoint in the place of the other creditor. Therefore it was plain and palpable on the face of it.

Then there is the case in the 10th Queen's Bench of *Howard v. Gossitt*, which I shall not go into. There it turned upon the Speaker's warrant and upon the jurisdiction of the House of Commons; of course the High Court of Parliament had very great powers, and I do not think it at all necessary to go into that.

Then there is the *Queen v. Jones*, which was a good deal relied upon. The ground taken there was that it was a Writ *de contumace capiendo*, and it had issued upon, what? the Significavit of a Surrogate, and that appeared, and it was held the Surrogate had no right whatever to issue the Significavit, and therefore it was bad on the face of it.

Then comes the last case in the 8th *Ellis and Blackburn*, page 857, Lea and Rolley. That turned upon the 223rd section of the Bankruptcy Act. It was another adjudication of Bankruptcy, but if I remember right it was disposed of upon the very short ground that by the 223rd section of the Bankruptcy Act a man might be made bankrupt in certain specified cases, and only in those, and under that section, without stating that he came within it, an adjudication took place. There was no statement upon the record that he was within it, and the whole judgment is in two lines. Mr. Justice Crompton said "The Commissioner does not find that any of the cases specified in section 233, within which alone he could adjudicate, has arisen. Should not that be on the face of the order according to the authority of

Christie v. Unwin." Then the present Lord Justice Lush was not called upon, and Lord Campbell said, "The Commissioner had no doubt jurisdiction if he had found the facts, but the fact is not stated," and therefore that was bad again on the face of it. It might have been an adjudication without any ground whatever.

Now I will mention another case which throws great light on the subject in a few moments, but in the meantime I will simply make this observation. It has never yet, as far as I know, been decided that every step in a cause from the commencement to the conclusion, including every notice and every act necessary to make the proceedings regular, must be stated on the face of an order made by a Court having limited statutory jurisdiction. If there be such a decision I should very much doubt its correctness. It is one thing to say the order of such a Court must on the face of it show jurisdiction, and it is another thing to say that the order must set out all the proceedings anterior and down to the time of making the order in question, so as to show that all the provisions of the Act have been complied with. Further, I entertain considerable doubt whether the authorities cited are applicable to proceedings in the Court of Arches to the extent to which they are sought to be applied.

Now here I will, not at any great length, call attention to what I cannot help thinking are two of the most learned and remarkable Judgments of two of the most eminent Judges that have sat in Westminster Hall for a long time, I mean the late Lord Justice Erle and the late Mr. Justice Willes, in which the whole doctrine which has been so much discussed here as to what ought to be set out on the face of the proceedings, and what are superior Courts and what are inferior Courts and to which Courts you should give credit and to which you should not, are gone into at a length which is most instructive and I think equally remarkable. That was the case of Mr. Fernandez, and it was a case that attracted a great deal of attention at the time. It was tried at York; it was an information for bribery, and Mr. Fernandez refused to answer a question which might, if he answered it in one way, have convicted a friend of his who was indicted for bribery. It was tried before Mr. Justice Hill, who was sitting there as a Judge of Assize, and he committed Mr. Fernandez. He said his conscience would not allow him to answer the question, he thought he ought not to criminate his friend, and Mr. Justice Hill fined him a heavy fine, and committed him until he cleared his contempt. The question was, whether or not a Judge, sitting under the commission of the Assizes, was a superior Court within the meaning of the cases to which I have adverted, and which established the rule that in certain cases a Court having certain statutory jurisdiction, must on the face of its orders state everything necessary to shew jurisdiction.

Now a great deal of importance is attached to the expression, "superior Court;" but the question is, What is a superior Court within that meaning?

Now there are degrees of superior Courts, and those who choose to take the trouble to read these two judgments will find an amount of learning which may perhaps enlarge their knowledge, as it did at the time enlarge my knowledge. I think if attention is paid to that case carefully, you will arrive at the conclusion that before you can take objection to the proceedings in the present case, apart from the forms, you must consider what is the character and constitution of this Court.

Now whatever it was before Lord Penzance was appointed, whether it was or was not a superior Court, no doubt it had very large jurisdiction. It was a Court of Appeal of the most extensive jurisdiction, but all that we need to

do to day is to enquire whether it is now one of the superior Courts to which the credit is given, to which I have adverted. Now by the Act of 1874, Lord Penzance is made a Judge of that Court. The Court is made a Court of Record. The qualifications for that Judge are no doubt of a high order, and in every respect, so far as I can see, it is as much a superior Court as any one of the Courts in Westminster, if the character of the Court and the constitution of the Court are the grounds upon which you should act when directing whether it is or is not a superior Court such as I have adverted to. Now the case went a great length, but Lord Chief Justice Erle deals with the question of the superior Courts of Record, and points out that the description given of them in Bacon is not correct. Bacon says, "Superior Courts of Record are those that are more principal or less principal; the more principal ones are the Lords' House in Parliament, the Chancery King's Bench, Common Pleas, and Exchequer; and by Hale, such are Justices *itinerant ad communia placita*, and *ad placita forestæ*. The less principal ones are such as are held by commission of gaol delivery, oyer and terminer, assize, nisi prius, &c." That was the great question whether a Judge sitting under the commission was a superior Court, entitled to the credit to which I have adverted. As the Lord Chief Justice said, in the opinion of the compiler of that work, the Court of Assize is a superior Court of a less principal degree, but the proposition to be established is that the Court of Assize is not a superior Court, and that is reasoned out, and his Lordship comes to the conclusion that it is a superior Court within the meaning of the principle to which I have adverted.

Now I pass over the whole of that judgment. Mr. Justice Willes goes through all that and a great deal more, and comes to the same conclusion. He gives the whole history of how Judges came to be sent on circuit, and what their duties are, and then he concludes by saying, "It thus appears to me very clearly whether I consider the origin, the history, the procedure, or the jurisdiction of the Court of Assize, or the estimation in which it has been held that I must clear it as a superior Court of a high order, considering the origin of a high order."

Then Mr. Justice Byles gives a short judgment, he says, "The power of commitment for contempt is indispensable to the administration of public justice, and the knowledge that it is indispensable renders its exercise generally unnecessary."

I wish that were more thought of than it is.

Then he says, "It is plain upon the authorities, and is submitted, that a superior Court may commit for contempt of Court in terms much more general than the language of this warrant."

The warrant in that case simply stated that Mr. Fernandez declined to answer a question which by law he was compellable to answer. It did not state the question; it did not state anything to show it was relevant, but simply alleged he refused to answer the question which by law he ought to answer, and for that he was committed. Mr. Justice Byles says, "It is plain upon the authorities, and it is admitted that a superior Court may commit for contempt of Court in terms much more general than the language of this warrant. That power has been decided to belong, not only to the High Court of Parliament, that is, to the House of Lords and to the House of Commons, but also to the Court of Queen's Bench, Common Pleas, and Exchequer, and to all superior Courts of Record. The main question therefore, is, whether a Court of Assize be one of the superior Courts of Record." Now of course one cannnot forget that at one time the Court of Common Pleas was an inferior Court, in this sense that this Court of Queen's Bench

reviewed the judgments of the Court of Common Pleas. The Court of Common Pleas was a Court with limited jurisdiction in many cases, and this Court is repeatedly called upon, I may say almost daily, to exercise jurisdiction limited by statute. Such cases are continually arising, and although it has jurisdiction at common law also, it has jurisdiction in many cases which is limited by statute. I do not myself see any reason why the distinction should be taken between orders made in the one case and in the other. Then Mr. Justice Byles shortly alludes to the position of the Judge on circuit, and says, "To call a Court so constituted and of jurisdiction so transcendant, an inferior Court, seems to need some authority, and so the learned counsel appeared to think." Then he deals with the form of the proceedings, and says, "I am by no means prepared to decide, even if the law were as the learned counsel contends, that this warrant is not perfectly good, otherwise a warrant must be drawn with a very inconvenient degree of length and certainty;" and he came to the conclusion that it was sufficient simply to state that the man had refused to answer a question which by law he was bound to answer. He held, treating it as an order of the superior Court, it was perfectly sufficient.

However, as I say, it is unnecessary to discuss the question, as I am clearly of opinion that the monition is good for the reasons given by the Lord Chief of Justice and my brother Field, and I repeat again I have only gone into that matter because it may be this case will go elsewhere, and I think that that is a question which is well worthy of consideration.

Now, the next document said to be invalid is the inhibition which was issued on the 19th of March 1880. The amended rules and orders and forms had been allowed and issued on the 22nd of February 1879, the day after the monition. Now these amended rules were made by the same learned persons who made the rules of 1875. They were also allowed by the Queen in Council; they were tacitly approved by both Houses of Parliament, and by the amended rule 37, it is provided, and this, I think, is not unimportant— "It shall be competent for the complainant at any time after service of the monition to apply to the Court to enforce obedience to the monition. In case of disobedience to the monition of the Judge, the application shall be made by motion supported by affidavit." That looks as if it was thought by these learned persons, that there was some mode of enforcing it. We shall come to section 13 by and bye. Then section 38 says, "an inhibition if ordered by the Judge shall be issued from the Provincial Registry upon the application of the complainant," and the form is given in Appendix 26.

That form is the form adopted in the present case, and for the reasons already given with respect to the monition, I am of opinion it is free from the objections that have been taken to it. I may observe that, as regards the style of the Judge, it is that of Official Principal of the Arches Court of Canterbury, which shews that, in the opinion of those very learned framers of the amended rules, the style adopted in the monition is the correct one. Now putting it at the lowest, in the opinion of these very learned persons that was a sufficient form, and we are called upon to overrule it. We are really asked to overrule that which they must have decided in their own minds when they framed that rule. I should pause before I did so.

I now come to the question whether Lord Penzance, as Judge of the Arches Court of Canterbury, had the power to enforce obedience to his inhibition by a significavit, followed by the writ *de contumace capiendo*. This is a question of great importance. No express provision is made for it in the rules, but rule 81 of the amended rules is as follows:—"In any particular not provided

for by these rules the general practice of the Arches Court shall be followed as far as the same is applicable." Now, to my mind, that is abundantly sufficient. That was a well known settled practice. It is a practice created by Parliament and founded upon legislation. I allude, of course, to the Acts of Elizabeth, and the Acts of George 3rd., and therefore it is quite enough to say that, "in all other particulars the practice of the Arches Court shall be followed as far as the same is applicable." It is not denied that, according to the general practice of the Court of Arches obedience to an order like the present is enforcible by significavit and imprisonment by virtue of the writ *de contumace capiendo*. But it is said in the absence of express provisions in the Act of 1874 the Act has no such power, and secondly it is said that even if the Judge would otherwise have had the power, the 13th section excludes it. In order to arrive at a correct conclusion upon this point, it is necessary to consider not only the character and position of Lord Penzance, and the powers which he unquestionably possessed, but also what offence it is for which Mr. Dale has been sent to prison. In the first place Lord Penzance is, as I have already said, by virtue of the statute, a Judge of the Court of Arches, which is the Ecclesiastical Court for the whole province of Canterbury and a Court of Record, and as such he has jurisdiction over all offences against the Ecclesiastical Law (that is as Judge) which are specified in the 8th section of the Act of 1874. He has jurisdiction over the other offences by the Act of 1840. The eleven offences, of which the defendant has been adjudged to be guilty, are included in that section. By the monition the defendant was admonished to abstain for the future from committing those offences. He has disobeyed the monition, and by virtue of the 13th Section of the same Act he has been inhibited from performing any service in the Church or otherwise exercising the cure of souls within the diocese of London until by writing under his hand he undertakes to give obedience to the monition. He has disobeyed the inhibition, and the Judge has signified such his disobedience to the Court of Chancery, according to the usual and ordinary practice of the Court of Arches, and thereupon the writ *de contumace capiendo* has been issued by the Court of Chancery under which the defendant has been arrested and imprisoned.

Then the 53 George III, cap. 127, I need not repeat, for it has been read already and I will not read it over again. It is not denied that the matter of the representation in the present case, and the proceedings consequent upon it, constitute a cause within the meaning of this statute, nor is it denied that in the absence of the 13th section of the Public Worship Regulation Act the proceedings by significavit would have been regular and valid. But it is contended that by that Section the legislature has provided special means for enforcing obedience to a monition, namely by an Inhibition against performing divine service and the voidance of the defendant's benefice if he does not within three years undertake to pay obedience to the monition, consequently it is contended that the Judge has no power to signify disobedience of the inhibition. It is difficult to see any reason for such a contention. The expressed object of the Act was to make further regulations for the administration of the law relating to the performance of divine service according to the use of the Church of England. The defendant might have been proceeded against under the Church Discipline Act of 1840, the 3 and 4 Victoria cap. 86, Section 23, in which case it is not denied that if the case had been sent to the Court of Arches by letters of request, obedience to the orders of the Court could have been enforced by significavit and the writ *de contumace capiendo*.

The only difference between proceedings under that Act and the Act of 1874 is in the forms to be gone through in order to arrive at the same conclusion. The manifest object of the Act of 1874, was to provide a more simple and speedy way of enforcing obedience to the laws of the Church, with reference to the performance of divine service in Churches and Churchyards. It would indeed be strange if the legislature having provided stringent means for obtaining that end, had enabled contumacious clerks to set the law at defiance and continue their malpractices for three years, and yet such is the result if the Judge cannot enforce obedience to his inhibition by significavit and writ. Suppose a contumacious clerk were by writing under his hand, it has struck me, and I confess I do not see the answer to it at present, in the forms prescribed by the Rules and Orders to undertake, pursuant to the 13th Section of the Act, that he would pay obedience to the monition and immediately afterwards disobey it. Can it be contended he could do so with impunity? I should think not; and if he could not, why not? Why should he be permitted to disobey the inhibition, and also disobey the monition for the three years, in other words for as long as he should continue to hold his benefice, unless he gave the undertaking to which I have adverted. The proposition seems to me to be so monstrously absurd, that in the absence of express words prohibiting the Judge from signifying a clerk's disobedience, I should hold that he is bound to signify, if required so to do by the complainant. The inhibition is in the nature of an injunction in so far as it restrains the clerk from performing divine service until he undertakes to obey the monition, and surely if a Court, especially if it be a Court of Rector, has power to grant an injunction, it has the inherent power to commit for disobedience of it. The only difference between a temporal Court and an Ecclesiastical Court being, that the Judge of the temporal Court may make an order to commit at once direct, whereas the Ecclesiastical Court has to proceed according to the laws and usages of the Court, and has to signify the contempt to the Court of Chancery, and that Court issues a writ *de contumace capiendo*, by virtue of which the person is arrested and taken to prison, there to remain until he clears his contempt. It is said that if the legislature had intended to give the power of committing by means of significavit and writ, they would have done so in express terms; the answer to that contention is that the legislature had already provided for it in express terms by the 5th Elizabeth, cap. 23, and the 53 George III, cap. 127, section 1. I only wish that the legislature would leave the existing law as existing law instead of sometimes repeating it again in subsequent Acts, for it often leads to confusion, the same language not exactly being used. I abstain from repeating all the reasons given by the other members of the Court for holding that the Judge had the power which he has exercised, for it seems to me to be unanswerable.

Now the last objection which I intend to notice is the objection which is taken to the delivery of the writ *de contumace capiendo* to the sheriff, without its having been brought into the Court of Queen's Bench—that is now the Queen's Bench Division of the High Court, pursuant to the statute of the 53rd George III, and the statute of William. By the 5th Elizabeth the writ must have been issued and also made returnable in term time, and it was provided that after been made and sealed, the writ should forthwith be brought into the Court of Queen's Bench, and there in the presence of the Judges opened and delivered of Record to the sheriff. By the 12th and 13th Victoria, chapter 109, sections 26 and 27, the writ may be issued and made returnable in vacation, and consequently at the time when as the law

then was—that was in 1849—the Court of Queen's Bench could not sit. It seems to follow that by necessary implication the statute of Elizabeth, and so much of the statute of 53rd George III. as incorporated, it is *pro tanto* repealed by the 12th and 13th Victoria, chapter 109. If not then, although the writ may be issued and made returnable in vacation, it could not be used and would be simply a piece of waste parchment. I may here observe that in the last edition of Chitty's Statutes, the 26th section of the Act 12th and 13th Victoria is omitted, and that led to our being told in the course of the argument that it had been repealed by the Statute Law Revision Act, 1875. But upon reference to that Act it will be found that only the latter part of the 26th section, commencing with the word "whether," is repealed. The former, and the only important part of the section, remains in force. Now I confess that at the time when that was told me, I took it for granted that the 26th section had been repealed, and, taking for granted what was stated at the bar that it was so, I did think it was extremely doubtful whether or not that 12th and 13th Victoria had, by implication, repealed the statute of Elizabeth. But when I look to the Statute Law Revision Act of 1875, I find that it is repealed from the word "whether;" therefore the first part is in these terms: "And be it enacted that every writ of every description, whatsoever hereafter to be issued out of the said office of the Petty Bag," and this writ is one of them, "shall or may be issued or tested on any day, not being a Sunday, Good Friday, or Christmas Day." Now that goes to the root of it. It may be issued in vacation, and may be returnable in the same vacation. For instance, if it had been issued say on the 12th August, and returned on the 12th September, it could not be brought into Court to be opened and delivered of record. It follows therefore that with that remaining you have a perfect repeal of it, because by the 27th section that applies to the return of the writ, and the other applies to the issuing of it. So by the 26th section it may be issued, and by the 27th it may be returnable in vacation. In the last edition of Chitty it is omitted; and I am not surprised that the bar, as well as myself, were misled. Certainly, speaking for myself, I was misled into supposing that it was repealed, but it is not repealed; all the other words were pure surplusage, and there is no meaning in them: those that are repealed—and here I may venture to recall an observation I made at the time which I was sorry for afterwards. I fell rather into the suggestion that the revision of these statutes was likely to lead to a good deal of confusion. I confess at the moment when it was urged with great force that to repeal this and repeal that, and leave this, that, or the other, would lead to great confusion. I confess I was struck at the time with it, and I think I rather hastily assented to the suggestion that it might be a very unprofitable and even mischievous work. On consideration I have thought it right to look carefully into the matter, and I have come to the conclusion that not only is it not unprofitable or mischievous, but most valuable, taking it with the chronological table which has been published, you can take up at a moment the Repeal Act of 38th and 39th Victoria, chapter 66, and refer to the chronological table, and can see every part of every statute that has been repealed. I therefore recall absolutely, without qualification, the observation which I rather hastily was led to make. If the statute of Elizabeth had not been *pro tanto* repealed, I have very considerable doubt—I only throw it out in case this should go elsewhere—having regard to the preamble which shows what the purpose and object of it is, that it has nothing to do with what the defendant complains of, but it is in order that it might more

effectually be put in force against a contumacious person, it is entirely for that purpose that it is passed, and I very much doubt indeed, having regard to the preamble and the other provisions, whether the defendant could take the objection that the writ had not been brought into Court, but it is unnecessary to decide that point because I am clearly of opinion that it was repealed *pro tanto*.

The result is that all the objections taken on the part of the defendant, fail. The several rules to show cause which have been granted must be discharged, and I suppose with costs.

Now I cannot conclude without making a very short observation. I do trust and earnestly hope that this case may lead contumacious clerks in Holy Orders, whose duty it is both to preach and to practice obedience to the laws of the land, to consider well whether instead of persistently and defiantly breaking these laws, they ought not, aye, even as good citizens, and as a matter of conscience and duty, to resign their benefices and become nonconformists, if they cannot comply with the law. We are living in perilous times. A wide-spread spirit of lawlessness is steadily on the increase, and it behoves, not only Judges and ministers of religion, but all good citizens to do their uttermost to uphold, and if necessary to enforce the law. Obedience to the law is the foundation upon which all the rights from the Crown down to the meanest subject of the realm are based and founded.

The Lord Chief Justice: The rule will be discharged. The ordinary course will follow. The proper order will be that the Habeas and other three rules be discharged with costs. There will be one set of costs and those to the party.

The Attorney General: Do I understand your Lordship that the judgment of the Court is that Lord Penzance, who is made a party to the three rules, and has notice to appear in the fourth, namely, the Habeas Corpus, is not to have his costs. I hope I am not doing wrong in asking your Lordship, but I thought it was my duty to apply. What the consideration hereafter of others may be, I must leave it to them, but I think your Lordship will excuse my saying that I think it is my duty in Court now to ask for them.

The Lord Chief Justice: I do not think so, I do not say what your legal rights are, but I do not think it is usual to give a Judge costs.

The Attorney General: Lord Penzance was made a party to three of the rules.

The Lord Chief Justice: He was bound to appear, but he was not bound to do more than leave himself in the hands of the Court. He has chosen to appear. I think there must be only one set of costs.

The Attorney General: I do not wish to press the matter unduly.

JUDGMENT OF THE QUEEN'S BENCH DIVISION

IN THE CASE OF

THE REV. R. W. ENRAGHT v. LORD PENZANCE AND OTHERS.

Delivered, December 13, 1880, by the same Judges.

THE LORD CHIEF JUSTICE: I am of opinion there is no ground for distinguishing this case from the other. It is suggested that all the points that arise in the last case arise in this, and of course if they had been attempted to be argued they would have been decided in the same way that the Court decided the last case. The point that Mr. Charles makes upon this case, no doubt, is a fresh point, and he is entitled to take it to have it

considered. As I understand it, it is this: There is a Monition issued to the applicant in this case, Mr. Enraght, admonishing him from doing certain specified illegal acts, and then proceeding according to the statute to order him not to permit or suffer—those are the words of the statute—the same things to be done by anybody else, the statute manifestly contemplating and intending to throw the onus of obedience upon the proper person, namely, the Incumbent, the person who is answerable for the conduct of public worship in the church, and intending to prevent what might otherwise have happened if the Incumbent had yielded obedience, but the congregation, if they were offended or the law were broken, of which I say nothing, would be equally offended, and the laws equally broken in the person of another clergyman, who would not be within the words of the statute, because he was not the Incumbent, and therefore the whole object of the statute would be evaded. The statute, therefore, expressly pointed to this, that the Incumbent was not to do the things himself, and he was not also to permit and suffer them to be done, because he is the responsible person. Then this Monition admonishes him to abstain from certain specific acts, which specified acts had been brought before the Judge as acts done by the Incumbent, and then it went on to say in general terms having ordered him to abstain from these different specified acts, "and also from the practices, matters, and things of the same or the like nature to those hereinbefore set forth, or any of them," and then came these words, "or from unlawfully permitting the same or any of them." That is to say, we do not know what your Curate may do, but you are a Clerk in Holy Orders, you must be assumed to know the law of your Church, and you must prevent your Curate from breaking the law of the Church. Then the Inhibition proceeds upon various ground, saying you have not obeyed the orders made upon these specified matters, and you have permitted your Curate to do certain other things. The Inhibition follows in substance the words of the Monition, and there is no point arises such as Mr. Charles suggests in point of fact. When the Monition comes to be looked at, if ever the point does arise in point of fact with reference to the point which he has made, it will be time to dispose of it; I say nothing as to how I should dispose of it, but it has not arisen. It seems to me on the grounds I have put this Monition and Inhibition are perfectly good.

Mr. JUSTICE FIELD: I am of the same opinion, and upon the same grounds.

Mr. JUSTICE MANISTY: I am of the same opinion.

The Lord Chief Justice: Is any one instructed to shew cause in these Rules?

The Attorney-General: Yes, my lord, I appear for Lord Penzance.

The Lord Chief Justice: I have been thinking about that. It happened to myself in a very similar case, where a mandamus was moved against me in a matter in which I had to discharge a certain duty as Chief Justice of the Common Pleas. What I did was to submit myself to the Court. I did not think it necessary to argue it. Therefore I think we cannot give Lord Penzance his costs, but we give costs of these rules against the party.

The Attorney-General: I would only make this observation, that here there were personal charges against Lord Penzance that he had not taken the oath of office, a matter over which the party could have no control. It was his own individual act, and this is a question where the jurisdiction of the Judge is called in question.

The Lord Chief Justice: I do not think so; of course Lord Penzance takes his own course, and of course I am not assuming to express the slightest opinion upon it. He is entitled to take the course he thinks right, but certainly, according to my recollection in former cases where there were motions made against the Dean of the Arches, in which I have been myself more than once, they were all prohibiting him from hearing, or for a mandamus to him to hear. According to the best of my recollection, cause was always shown by the parties, and the Dean of the Arches left himself in the hands of the Court.

The Attorney-General: If your Lordship thinks that I will not press it.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Reverend Charles Joseph Ridsdale, Clerk, v. *Clifton, from an Order of the Judge as Official Principal of the Arches Court of Canterbury; delivered 12th May*, 1877.

Present at the hearing of the Appeal:—Lord Chancellor [Cairns]; Lord Selborne; Sir James W. Colvile; Lord Chief Baron [Kelly]; Sir Robert Phillimore; Lord Justice James; Sir Montague E. Smith; Sir Robert P. Collier; Sir Baliol Brett; Sir Richard Amphlett. Episcopal Accessors:—Archbishop of Canterbury [Tait]; Bishop of Chichester [Durnford]; Bishop of St. Asaph [Hughes]; Bishop of Ely [Woodford]; Bishop of St. Davids [Jones].

The Appeal of Ridsdale *v.* Clifton, in which their Lordships have now to state the recommendation which they propose humbly to make to Her Majesty, is an Appeal to Her Majesty in Council brought by the Rev. Charles Joseph Ridsdale, Clerk, Incumbent, or perpetual Curate of St. Peter, Folkestone, against an Order or Decree pronounced by Lord Penzance, as Judge or Official Principal of the Arches Court of Canterbury, on the 3rd of February, 1876.

This Judgment specified various matters as to which it declared that the Appellant had offended against the laws ecclesiastical; but the Appeal is brought in respect of four only of these matters, and it is to these only that the observations of their Lordships need be directed.

The four matters as to which the Appeal complains of the Judgment are these:—

1. The wearing during the service of the Holy Communion of vestments known as an alb and a chasuble.

2. The saying the Prayer of Consecration in the service of the Holy Communion, while standing at the middle of the west side of the Communion Table, in such wise that the people could not see the Appellant break the bread or take the cup into His hand.

3. The use, in the service of the Holy Communion, of wafer-bread or wafers, to wit, bread or flour made in the form of circular wafers, instead of bread such as is usual to be eaten.

4. The placing and unlawfully retaining a crucifix on the top of the screen separating the chancel of the church from the body or nave.

There were eight other charges against the Appellant, as to all of which he was admonished by the learned Judge, but as to none of which is there any Appeal.

Of the four charges which are the subject of Appeal, the three first were considered by the learned Judge to be covered by the decision of this Committee in the case of Hebbert *v.* Purchas, and by the Order of Her Majesty in Council made in that case; and as to them he did not exercise any independent judgment.

The fourth charge, as to the crucifix, the learned Judge did not consider to be covered by authority otherwise than indirectly and by implication.

Their Lordships have had to consider, in the first place, how far, in a case such as the present, a previous decision of this Tribunal between other parties, and an Order of the Sovereign in Council founded thereon, should be held to be conclusive in all similar cases subsequently coming before them. If the case of Hebbert *v.* Purchas is to be taken as absolutely conclusive of every other case, with the same or similar facts, there can be no doubt that the decision of the learned Judge on the first three heads, being in accordance with that of Hebbert *v.* Purchas, was correct.

In Hebbert *v.* Purchas, the Defendant did not appear, either before the Dean of Arches or before the Judicial Committee; but, after the decision of the Judicial Committee was pronounced against him, he presented a Petition praying for a rehearing.

The Judicial Committee to whom that Petition was referred were of opinion that, to have granted such an application would have been to violate the spirit of the 2nd and 3rd William IV, cap. 92, which transferred the powers of the Court of Delegates to the Sovereign in Council, and provided that every Judgment, Order, and Decree should be final and definitive, and that no commission should thereafter be granted or authorized to review any Judgment or Decree made under that Act.

All that this decided was the finality of that Judgment *inter partes;* and the propriety of its being held final in that case was the more obvious from the fact that a Defendant not appearing in the Primary Court or on the Appeal might be supposed to be lying by, taking the chance of a decision in the first instance, and then trying to get rid of it when it turned out to be unfavourable.

The present case, however, raises the question of finality not *inter partes,* but as against strangers.

In the case of decisions of final Courts of Appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties.

The law as to rights of property in this country is to a great extent based upon and formed by such decisions. When once arrived at, these decisions become elements in the composition of the law, and the dealings of mankind are based upon a reliance on such decisions.

Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly ought not to be reopened without the very greatest hesitation.

Their Lordships are fully sensible of the importance of establishing and maintaining, as far as possible, a clear and unvarying interpretation of rules

the stringency and effect of which ought to be easily ascertained and understood by every Clerk before his admission to Holy Orders.

On the other hand, there are not, in cases of this description, any rights to the possession of property which can be supposed to have arisen by the course of previous decisions; and in proceedings which may come to assume a penal form, a tribunal, even of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject.

It is further to be borne in mind that in the case of Hebbert *v.* Purchas, the Judicial Committee, although they had before them a learned and able Judgment of the then Dean of Arches in favour of Mr. Purchas on the points now raised, had not the advantage of an argument by Mr. Purchas' Counsel on those points.

These considerations have led their Lordships to the conclusion that, although very great weight ought to be given to the decision in Hebbert *v.* Purchas, yet they ought in the present case to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from those reasons, to decide upon their own view of the law.

Their Lordships will now proceed to consider the first charge against the Appellant, namely, that of wearing an alb and chasuble. They will, however, premise that they do not propose to express any opinion upon the vestures proper to be worn by Bishops, as to which separate considerations may arise; and in referring to the dress of the parochial clergy, they will, for greater convenience, use the term "vestments" for the purpose of denoting the alb and chasuble or cope, as distinguished from the surplice.

The argument of the Appellant on this head, which was very clearly and very forcibly stated, may be thus summed up. The Ornaments Rubric, he contends, in the revised Prayer Book of 1662 is now the only law as to the vesture of the clergy. It contains within its one sentence all that is now enacted upon that subject. It sweeps away all previous law as to the vesture of the clergy, whether that law was to be found in Statute, Canon, Injunction, or otherwise. It authorizes the use of all ornaments which had the Parliamentary authority of the First Prayer Book of Edward the Sixth. The vestments in question are among the ornaments which had this Parliamentary authority; therefore it authorizes the use of the vestments in question.

To this reasoning, if the first proposition in the series be correct in point of fact and law, no exception could, probably, be taken. Their Lordships, however, are unable to accept that proposition. They are of opinion that it is a misapprehension to suppose that the Rubric note of 1662 as to ornaments was intended to have, or did have, the effect of repealing the law as it previously stood, and of substituting for that previous law another and a different law, formulated in the words of that Rubric note, and of thus making the year 1662 a new point of departure in the legislation on this subject.

Before, however, proceeding to trace the history of the law, their Lordships must observe upon the expression in the argument which asserts that the Ornaments Rubric "authorises" the use of the vestments in question. In the opinion of their Lordships, if the only law as to the vesture of the clergy is to be found in the Ornaments Rubric, the use of the vestments of the First Edwardian Prayer Book is not merely authorized, it is enjoined. It is not an enactment ordering the accomplishment of a peculiar result, and suggesting or directing a mode by which the proposed result may be attained. The sole object of the Rubric is to define the mode of performing an existing ministration. If

the Rubric is taken alone the words in it are not optional, they are imperative; and every clergyman who, since 1662, has failed, or who may hereafter fail, to use in the administration of the Holy Communion the vestments of the First Edwardian Prayer Book, has been, and will be, guilty of an ecclesiastical offence rendering him liable to heavy penalties. Any interpretation of the Rubric which would leave it optional to the minister to wear or not to wear these vestments, not only would be opposed to the ordinary principles of construction, but must also go to the extent of leaving it optional to the minister whether he will wear any official vesture whatever. If the Rubric is not imperative as to the alb and the chasuble or cope, in the Communion Office, it cannot be imperative as to the surplice in the other services, or any of them.

It is necessary now to ascertain the state of the law before the Act of Uniformity and Rubric of 1662; and then to examine whether any and (if any) what alteration was made by that Act and Rubric.

In the first Book of Edward the Sixth (1549), the directions as to the vestures of the ministers officiating in the public services of the Church (omitting all that relates to hoods and the directions as to Bishops) were as follows:

In the saying and singing of matins and evensong, baptizing and burying, the minister was to use a surplice. In the administration of the Holy Communion the celebrant was to "put upon him a white albe plain, with a vestment or cope," and the assistant-ministers (priests and deacons) were to "have upon them likewise the vestures appointed for their ministry, namely, albes with tunicles."

These directions were omitted from the Second Book of King Edward (1552); and, instead of them, a Rubric was inserted, immediately before the order for Morning Prayer, in these words:—"And here it [*dele* it] is to be noted, that the minister, at the time of the Communion, and at all other times in his ministration, shall use neither alb, vestment, nor cope; but . . . . . being a priest or deacon, he shall have and wear a surplice only." This Book was "annexed and joined" to the statute 5th and 6th Edward the Sixth, cap. 1, and was established as law thereby.

King Edward died within a few months after the time appointed for this statute to take effect, and the re-action under Queen Mary followed. Upon the accession of Queen Elizabeth, the Legislature, reverting to the state of matters which had existed when the Second Book of Edward was introduced, determined at once to restore the Liturgy and offices of religion contained in that book, with a few specified alterations, but to leave the question of the vestures of the ministers of the Church open for further consideration. The natural course under these circumstances was that adopted, viz., to "retain" the use of the vestures which had been authorized before 1552, until a final settlement of that question could conveniently be made.

No new or revised Prayer Book was annexed to Queen Elizabeth's Act of Uniformity (1 Eliz. cap. 2); but the Second Book of King Edward, "with the alterations and additions therein, added and appointed by this statute," (viz., "one alteration or addition of certain lessons to be used on every Sunday in the year, and the form of the Litany, altered and corrected, and two sentences only added in the delivery of the Sacrament to the communicants," as specified in the 3rd section), was directed to stand and be in full force and effect from the 24th June, 1559.

The enactment, however, that the Second Book of King Edward was to be used, with these alterations and additions, "and none other or otherwise,"

(sect. 3), was further qualified by the provisos contained in the 25th and 26th sections, of which the former is in these words:—

"Provided always, and be it enacted, that such ornaments of the Church, and of the ministers thereof, shall be retained and be in use, as was in this Church of England by authority of Parliament in the second year of King Edward the Sixth, until other order shall be therein taken by the authority of the queen's Majesty, with the advice of Her Commissioners, appointed under the great seal of England for causes ecclesiastical, or of the Metropolitan of this realm."

In this manner, and not by any textual alteration of the Rubrics in the Second Book of King Edward, the directions as to ornaments of the First Book were kept in force until other order should be therein taken, in the way provided by the Act.

The authorities whose duty it was to issue to the people, in 1559, a printed Book of Common Prayer, made conformable to the Statute, prefixed to the Book so issued by them a copy, *in extenso*, of the Statute of Elizabeth itself; and they also of their own authority, not by way of enactment or order, but by way of a memorandum or reference to the statute, substituted a new admonitory note or Rubric for the note immediately preceding the order of Morning Prayer in the Second Book of King Edward.

That note or Rubric, as is pointed out by Bishop Gibson,* was not inserted by any authority of Parliament. It was meant to be a compendious and convenient summary of the enactment on this subject. If it was an accurate summary, it was merely a repetition of the Act. If it was inaccurate or imperfect, the Act, and not the note, would be the governing rule.

It is of importance to bear in mind that the Ornaments Rubric, which it is now contended contains the whole enactment or law relating to the vesture of the clergy, was not when originally introduced in 1559, and was not meant to be, an enactment at all; and it in fact ended with a reference to the Statute 1 Elizabeth, cap. 2, set out in the beginning of the Prayer Book, in terms which showed that the Rubric claimed no intrinsic authority for itself.

The Statute, by its 25th section, had enacted that the ornaments of 1549 should be retained and be in use, but only until other order should be therein taken, by the authority of the Queen, with the advice therein mentioned. The enactment was therefore in its nature provisional, and prepared the way for the subsequent exercise of a power reserved to the Queen. If that power was not exercised, the enactment in the 25th clause would remain absolute. If the power was exercised, the order made under the power would not be an order in derogation or by way of repeal of the Act; but the order would be in pursuance of and read into the Act as if that which was done by virtue of the reserved power had originally been enacted in the Statute.

Did, then, Queen Elizabeth ever take other order within the meaning of the 25th section?

Their Lordships do not think it necessary to dwell upon the Injunctions of Queen Elizabeth, and still less upon the interpretation of those Injunctions; because they cannot satisfy themselves, either that the Injunctions pointed to the vestments now in controversy, or that they were issued with the advice required by the section of the Act of Parliament.

But their Lordships are clearly of opinion that the Advertizements (a word

* Codex, Edn. 1761, p. 296.

which in the language of the time was equivalent to "admonitions" or "injunctions") of Elizabeth, issued in 1566, were a "taking of order," within the Act of Parliament, by the Queen, with the advice of the Metropolitan.

It is not disputed that these Advertizements were issued with the advice of the Metropolitan, and, indeed, also with the advice of the Commissioners for causes ecclesiastical; but it is said that they were not a taking of order by the Queen.

The Queen had in the most formal manner, by Her Royal Letters, commanded the Metropolitan and other prelates to prepare these Advertizements, directing them "so to proceed by order, injunction, or censure, according to the order and appointment of such laws and ordinances as were provided by Parliament, and the true meaning thereof, so as uniformity of order might be kept in every church, and without variety or contention."

There was no particular form required by statute or by law in which the Queen was to take order, and it was competent for Her Majesty to do so by means of a Royal Letter addressed to the Metropolitan. The Advertizements were issued by the Prelates as Orders prepared under the Queen's authority.

Immediately after their issue, on the 21st May, 1556, Grindal, Bishop of London, writes* to the Dean of St. Paul's requiring him to put them in force, and stating that they were issued by the Queen's authority, and that he (Grindal) would proceed to deprive any who should disobey them. The Articles of Archbishop Parker† speak of them as Advertizements set forth "by public authority." In 1583, in Articles presented to the Queen‡ herself by the Archbishop and some of the Bishops, they are referred to as the "Book of Advertizements," and in the margin as the "Advertizements set out by Her Majesty's authority."

Against this it is said that there is, nevertheless, other matter in the "Parker Correspondence" (lately for the first time published in a collected form, though it was partially known to some historical writers of the last century, who drew from it similar inferences), from which it ought to be inferred, as a matter of fact, that the Book of Advertizements was published without Queen Elizabeth's sanction.

Their Lordships cannot lend any countenance to the suggestion that the legitimate inference to be drawn from the tenor and language of public documents, from the acts done under them, and from the public recognition of their authority, could in any case be controlled by expressions found in a correspondence of this character. As, however, much of the argument against the authority of the Advertizements was founded on this correspondence, their Lordships think it right to say that they draw from the Correspondence, as a whole, a conclusion opposite to that in support of which it was referred to.

The first draft of the Book of Advertizements was prepared by the Archbishop and his colleagues very soon after the receipt of the Queen's letter of the 25th January, 1564-5, in the form of an order running in the Queen's name; and it appears, from passages in several letters, that they wished the Civil power to undertake as much as possible of the formal responsibility of promulgating and enforcing the proposed new order, and that they anticipated very great difficulty if, without that support, the principal share of the

* MS. from Dom. Eliz., vol. 39, No 76.

† 1 Card. Doc. An. 320.

‡ 163 State papers, Domestic, No. 31.

burthen should be thrown upon the ecclesiastical jurisdiction. An opposite view, however, prevailed at Court, where some of the Queen's Ministers and courtiers were more favourable than she was herself to the views of the Puritans, and where it was as well understood as it was by the Archbishop that the measure would encounter much unpopularity and opposition, so far as it was contrary to those views.

It further appears that in the first draft of the book (which is printed at length in the Appendix to Strype's "Life of Parker," No. 28, p. 84,) there were several doctrinal articles, and other articles (about the temporalities of Bishops, the employment of schoolmasters, and the dissolution of marriages within the prohibited degrees), which were afterwards omitted, and the legality of all or some of which, under any powers then vested in the Crown, might have been more than doubtful.

That the Archbishop knew that no new "Order" could legally be taken by the sole authority of himself and his brother Commissioners, is abundantly clear.

When, on the 8th March, 1564-5, he sent the first draft to Secretary Cecil to be submitted to the Queen, he wrote:—

"If the Queen's Majesty will not authorize them, the most part be like to lie in the dust for execution of our parts; laws be so much against our private doings."

That draft was not approved; he sent it again a year afterwards (12th March, 1565-6), with a letter containing this passage:—

"And where once, this last year, certain of us consulted and agreed upon some particularities in apparel (when the Queen's Majesty's letters were very general), and for that by Statute we be inhibited to set out any constitutions without licence obtained of the Queen, I sent them to your honour to be presented. They could not be allowed then, I cannot tell of what meaning; which I now send again, humbly praying that, if not all, yet so many as be thought good may be returned with some authority, at the least way for particular apparel; or else we shall not be able to do so much as the Queen's Majesty expecteth for us to be done."

That the Archbishop, both from his communications (in every stage of this business) with the Secretary of State (whose answers to him do not appear in the correspondence), and also from personal interviews with the Queen, must have had the Queen's pleasure distinctly made known to him, is no less certain.

In a letter dated the 12th April, 1566, he gives an account of an audience which he had on the 10th of March preceding (exactly two days before his letter of the 12th March to Cecil), when he had explained to the Queen the difficulty of enforcing the uniformity desired by Her Majesty. "I answered, that these precise folk would offer their goods and bodies to prison rather than they would relent, and Her Highness willed me to imprison them."

In his official letter to Grindal, dated the 28th March, 1566, inclosing the Book of Advertizements, he refers to another interview which they had both then recently had with the Queen by her own command, in which she charged them "to see her laws executed, and good orders *decreed* and observed."

In the letter which he wrote on the same 28th March to the Secretary of State, submitting the Advertizements in their final form (together with the draft of the letter to Grindal) for approval, he says:—

"I pray your Honour to peruse this draft of letter and the Book of

Advertizements, with your pen, which I mean to send to my Lord of London. *This form is but newly printed, and yet stayed till I may hear your advice.* I am now fully bent to prosecute this order and to delay no longer, *and I have weeded out of these Articles all such of doctrine, &c., which, peradventure, stayed the Book from Her Majesty's approbation, and have put in but things advouchable, and, as I take them, against no law of the realm.*" They could only be "against no law of the realm" if they were issued by the Queen's authority. For what purpose were they sent to Cecil, except to obtain that authority for their promulgation, in the form and manner proposed? It is true that the words follow (which were relied upon by the Appellant's Counsel):—"And where the Queen's Majesty will needs have me assay with mine own authority what I can do for order, I trust I shall not be stayed hereafter, saving that I would pray your Honour to have your advice to do that more prudently, in this common cause, which must needs be done." Their Lordships understand by this that the Queen had determined that the new order, made with her authority and approbation, should be enforced by the Metropolitan, through the ecclesiastical jurisdiction, without aid from the Privy Council or the secular power; not that the new order itself was to be without warrant, except from the sole authority of the Metropolitan, to whom, without the authorization of the Crown, the law had given no power to make any such order.

The facts that this duty was undertaken by the Archbishop reluctantly and possibly against his own judgment, that his wishes and opinions were on several points overruled, and that the Book of Advertizements was promulgated, not in the form which he would have preferred, but in that imposed upon it by the Royal will, all tend to prove that it was promulgated in that form with, and not without, the Queen's authority.

If, indeed, the legal effect of the Advertizements were to be judged of (as their Lordships do not think it ought to be) by the private opinion of Archbishop Parker, there is in the correspondence distinct evidence that Parker, after the Advertizements were issued, considered them to be an execution of the statutory power. Writing to the Lord Treasurer, November 15, 1573,* seven years after the Advertizements were issued, he says:—

"The world is much given to innovations, never content to stay to live well. In London our fonts must go down . . . . I do but marvel what some men mean . . . . with such alteration, when order hath been taken publicly this seven years by Commissioners, according to the Statute, that fonts should not be removed."

The Advertizements had ordered† "that the fonte be not removed," and this circumstance, and the expressions "order taken," "this seven years," and "Commissioners" (the Advertizements having been signed by the Bishops as Commissioners), make it clear that Parker was referring to the Advertizements. But the Advertizements could not have been a "taking of order publicly" "according to the Statute" unless they had the direct authority of the Queen.

Their Lordships now turn to the part‡ of the Book of Advertizements which deals with the vestures of the Ministers. It is in these words:—

"In the ministration of the Holy Communion in Cathedral and Collegiate

* Correspondence, p. 450.

† 1 Card. Doc. Ann. 326.

‡ Card. Doc. Ann.

Churches, the principal minister shall wear a cope, with gospeller and epistoller agreeably; and, at all other prayers to be said at that Communion Table, to use no copes, but surplices.

"That the Dean and Prebendaries wear a surplice with a silk hood in the choir; and, when they preach, to use their hoods.

"Item, that every minister saying any public prayers, or ministering the Sacraments, or other rites of the Church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish."

It was not seriously contended that albs or chasubles could, in any reasonable or practical sense, or according to any known usage, be worn, or could be meant to be worn, concurrently with the surplice. If, therefore, the use of the surplice, at the administration of the Holy Communion, was rendered lawful and obligatory by these "Advertizements," the use of albs or chasubles, at that administration, was thereby rendered unlawful.

Their Lordships do not forget that the Book of Advertizements also contains orders upon other distinct subjects not within the 25th section of the Statutes; as to some of which it was suggested in argument that the Queen had no legislative power. But this, whether the suggestion be well or ill-founded, is, for the present purpose, immaterial.

The proof of the subsequent reception and enforcement as law of the order established by the Book of Advertizements as to the vestures of the ministers of the Church in the administration of the Holy Communion throughout the Church of England from 1566 to the Great Rebellion, and again between the Restoration and St. Bartholomew's Day in 1662, is complete.

After 1566, vestments, albs, and tunicles (copes also, in parish and non-collegiate churches) are mentioned in the official acts of the Bishops and others, performed in the public exercise of their legal jurisdiction, only as things associated with superstition, and to be defaced and destroyed. They were so treated by a Royal Commission sent to Oxford by Queen Elizabeth in 1573, and by the Visitation Articles of Archbishops Grindal and Sandys (York, 1571 and 1578); and Abbot and Laud (1611 and 1637); of Bishops Aylmer, Bancroft, and King (London, 1577, 1601, and 1612), and others. The surplice, on the other hand, in a long series of Visitation Articles (sometimes accompanied by injunctions) of not less than thirty-two Archbishops and Bishops, of sixteen dioceses in England, commencing with Archbishop Parker in 1567,* and ending with Bishop Juxon in 1640,† besides those of various Archdeacons, is consistently treated as the vesture required by law to be used by all ministers of the Church, not only in their other ministrations, but expressly in the administration of both Sacraments. Among the most stringent in this respect are the Articles of Bishops Andrewes, Overall, and Wren. After the Restoration (if, as seems probable, the Visitations of Cosin and other Bishops in 1662, whose Articles of that year do not expressly refer to the Act 13th and 14th Car. 2, cap. 4, were held under the state of the law prior to that Act), we have not only Bishop Cosin‡ but Bishops Ironside of Bristol, Morley of Winchester, and eight others of as many dioceses (whose articles of 1662 are stated in the Appendix to the 2nd Report of the Ritual Commissioners to have been the same on this point with those of Morley), all administering strict inquiries, to the same effect.

This, however, is not all. There is direct proof in the same class of docu-

* 1 Card. Doc. Ann., 320. † 2 Rep. Rit. Com. 589.

‡ Works, vol. 4, 509, 510.

ments, and in others of a still more public and authoritative kind, that the Advertizements were accepted as law, as having the Queen's authority.

In a Visitation held in 1569, Bishop Parkhurst, of Norwich, inquired (not expressly mentioning the surplice), "Whether your Divine service be said or sung in due time and reverently, and the Sacraments duly and reverently ministered in such decent apparel as is appointed by the laws, the Queen's Majesty's Injunctions, and other orders set forth by public authority in that behalf." That he was referring to the Advertizements, and "by public authority," meant the authority of the Queen, seems clear from one of his "Injunctions to the Clergy" (the fourth), at the same Visitation, about perambulations, where he orders the clergy, on those occasions, not to use surplices or superstitious ceremonies, "but only give good thanks, and use such good order of prayers and homilies as be appointed by the Queen's Majesty's authority in that behalf." The use of homilies at perambulations was prescribed, not by the Injunctions of 1559, but by the Advertizements.

Bishop Cox, of Ely, in his "Injunctions" issued between 1570 and 1574, directed "that every parson, vicar, and curate shall use in the time of the celebration of Divine service to wear a surplice, prescribed by the Queen's Majesty's Injunctions and the Book of Common Prayer; and shall keep and observe all other rites and orders prescribed in the same Book of Common Prayer, as well about the celebration of the Sacraments, as also in their comely and priestly apparel, to be worn according to the precepts set forth in the book called "Advertizements." And, in his accompanying "Articles," he inquired, "Whether any, licensed to serve any cure, do not wear at the celebration of the Divine service and Sacraments, a comely surplice, and observeth all other rites and orders prescribed in the Book of Common Prayer, and the Queen's Majesty's Injunctions, and in the Book of Advertizements?"

Archbishop Grindal, in the Gloucester Articles of 1576, ordered the clergy "not to oppose the Queen's Injunctions, nor the Ordinations, nor Articles made by some of the Queen's Commissioners" (naming those who subscribed the Advertizements), "January the 25th, in the seventh year of the Queen's reign." (The date is that of the Queen's letter mentioned in the Advertizements, not that of the promulgation of the book itself.) This alone seems to have been thought by Strype* (an historian sometimes cited for a contrary purpose) sufficient proof that the Queen must in the end have authorized the publication of the Advertizements.

Archbishop Whitgift, in his celebrated Articles of 1584,† enjoined "that all preachers and others in ecclesiastical orders do at all times wear and use such kind of apparel as is provided unto them in the Book of Advertisements and Her Majesty's Injunctions, *anno primo*."

Bishop Thornborough, of Bristol, in 1603, inquired "Whether at any time, and during the whole celebration of Divine service and ministration of the Sacraments, in every your churches, your parson, vicar, or curate doth wear a surplice, according to the terms and statutes of this realm of England in that behalf provided; and how often default hath been made herein, and by whom?" In another Article as to Perambulations, he inquires whether the clergy say "the prayers and suffrages appointed" for that ceremony, "according to the late Queen's Majesty's Injunctions in that behalf provided, and according to the Book of Advertisements?"

* 1 Life of Parker, 319.

† 1 Card. Doc. Ann., 413.

The Book of Advertizements was referred to as of legal authority in several of the Canons of 1571; showing (though those Canons were not confirmed by the Crown, nor, apparently, ever put in force) the sense and understanding at that time, while the matter was still recent, of the Bishops and clergy of the whole Church of England represented in the Convocations of both provinces. The 24th and 25th Canons of 1603-4 repeated, with express reference to the Advertisements, as already containing the rule to be followed ("according to the Advertizements published anno 7 Eliz." "Juxta Admonitiones in Septimo Elizabethæ promulgatas") the substance of the directions contained in the Advertizements, as to the use of surplices, &c., in cathedral and collegiate churches; and the 58th Canon, which relates to the use of surplices at the administration of the Holy Communion in parish churches, followed, with scarcely any variation, the exact words of the Advertizements on the same subject.

The Convocations which passed those Canons thought them consistent with others (the 14th, 16th, and 56th), which enjoined the strictest possible conformity with the orders, rites, and ceremonies prescribed by the Book of Common Prayer, without addition, omission, or alteration; a view quite sound and correct, if the Advertizements were a legal exercise of the statutory power given to the Crown by 1 Eliz., cap. 2, section 25; but, on the contrary supposition, erroneous and untenable. The Canons of 1603-4 received the Royal Assent; so that on that occasion there was the most formal, solemn, and public concurrence possible, of the Crown and the Convocation of both provinces, in that understanding of the law, which had been acted upon for nearly fifty years by all the executive authorities of the Church. The Canons of 1640 (also confirmed by the Crown), which mention "Queen Elizabeth's Injunctions and Advertizements," carry on the public evidence of the same understanding down to the time of the Great Rebellion; and the Divines consulted by the Lords' Committee of 1641* alleged that the High Church party "pretended, for their innovations, the Injunctions and Advertizements of Queen Elizabeth," denying, indeed, that either the Injunctions or the Advertizements were in force, "but by way of commentary and imposition;" but not disputing that the Advertizements had such authority as Queen Elizabeth by law could give them.

To this it may be added that Hooker, the greatest ecclesiastical writer between 1566 and the Protectorate, describes the Advertizements as "agreed upon by the Bishops, and confirmed by the Queen's Majesty."† Cosin (although, in a passage which will afterwards be referred to, he appears to have at one time supposed that the conditions of the Statute had not been duly complied with) speaks of them ‡ as made under the Queen's reserved authority; and Wren ‖ as "Advertizements authorized by law (1 Eliz. cap. 2, sect. penult.").

From all these facts, the conclusion drawn by this Committee in Hebbert *v.* Purchas, that the Advertizements of Queen Elizabeth on this subject had the force of law under 1 Elizabeth, cap. 2, section 25, appears to their Lordships to be not only warranted, but irresistible.

Nor is the weight of these facts diminished by the circumstance (which was, in the opinion of their Lordships, established by the Appellant's Counsel), that the extensive destruction of albs, vestments, and copes, mentioned

* Card. Conf., 273. † 3 Hooker's Works, by Keble, 6th edition, p. 587.
‡ 5 Works, p. 90. ‖ Parentalia, p. 75.

in Mr. Peacock's book, and spoken of in the Judgment of Hebbert *v.* Purchas as if it had been later than the promulgation of the Advertizements, really preceded that event. The same causes which had led to the destruction, irregularly and without law, of a particular kind of ornaments, as to which the law, in its then provisional state, was at variance with the sentiment of the moderate, as well as of the extreme, section of the clergy of the Reformed Church, would naturally suggest the expediency of taking such order, upon the first convenient opportunity, as would give legal sanction to the disuse of those ornaments.

Reading, then, as their Lordships consider they are bound to do, the order as to vestures in the Book of Advertizements, into the 25th section of the 1st of Elizabeth, cap. 2, and omitting (for the sake of brevity) all reference to hoods, it will appear that that section, from the year 1566 to 1662, had the same operation in law as if it had been expressed in these words: "Provided always that such ornaments of the Church and of the ministers thereof shall be retained and be in use as were in this Church of England by authority of Parliament in the second year of King Edward VI, except that the surplice shall be used by the ministers of the Church at all times of their public ministrations, and the alb vestment or tunicle shall not be used, nor shall a cope be used except at the administration of the Holy Communion in cathedral and collegiate churches."

It is clear that, during the whole of this period, except during the interregnum of the Civil War and the protectorate, when the Episcopal Government of the Church and the use of the Liturgy were interrupted, this state of the law was generally understood, acted upon, and enforced by authority. It is also clear that throughout this long period the Ornaments Rubric, as originally printed in the Prayer Book of Queen Elizabeth, was allowed to remain unaltered. This, then, being the state of the law up to and in 1662, and the Ornaments Rubric, up to and at that time, not being in any sense a complete and independent enactment, but being merely a reference to an external law, namely, the Statute of 1st Elizabeth, cap. 2, the question has now to be asked, was it the intention, and was it the effect of the alteration in the Ornaments Rubric in 1662, to repeal the 25th section of the Statute of Elizabeth, and all that had been done under it, and to set up a new and self-contained law on the subject of ornaments?

The history of the Revision of the Prayer Book is strongly opposed to such a conclusion.

The Puritans, in their 18th "General Exception," at the Savoy Conference, stated various objections of principle to ceremonies in the Church, especially as to three matters: (1) the surplice; (2) the sign of the Cross in Baptism; and (3) kneeling at the Holy Communion. Following up their general "exceptions" with objections in detail to particular parts of the Book of Common Prayer, they said, commenting on the Ornaments Rubric, as it stood before the revision of 1662, "Forasmuch as this Rubric seemeth to bring back the cope, albs, &c., and other vestments forbidden by the Common Prayer Book, 5th and 6th Edward the Sixth, and for our reasons alleged against ceremonies under our 18th General Exception, we desire it may be wholly left out."

Baxter* seems to treat the objection as having been founded on the words in the Rubric "at the time of the Communion." "They excepted," he says,

* History of Life and Times, cap 8, p. 155.

"against that part of the Rubric which, *speaking of the Sacraments to be used in the Church*, left room to bring back the cope, albe and other vestments."

The words, "seemeth to bring back," assumed that those vestures of the First Book of King Edward were not practically in use under that Rubric. The words did not suggest—and they would have been erroneous if they had suggested—more than that the Rubric had the appearance of giving them some legal authority. The real substance of the objection was in the reference to the 18th General Exception, and in the request that the whole Rubric might be omitted, with the object, manifestly, of getting rid of the surplice. The Bishops do not appear to have considered the suggestion about "seeming to bring back," &c., worthy of particular notice. It would have been easy to answer it by showing that, under the Statute to which that Rubric referred, the surplice had been legally substituted for the albs &c. But knowing that the surplice itself was the only thing really in controversy, they contented themselves with saying: "For the reasons given in our answer" (in which they had defended ceremonies generally, and the surplice particularly, but had said nothing about copes, albs, or vestments,) "to the 18th General Exception to which you refer us, we think it fit that the Rubric continue as it is."

Although the Bishops would not yield on this point, it could not have been their intention, when they "thought it fit that the Rubric should continue as it was," to abolish the use of the surplice, and restore the ancient vestures, in any office in which, as the law then stood, the surplice was the vesture proper to be used. No one who holds in respect the memory of the Ecclesiastical Legislature of that day (whose revision of the Prayer Book was accepted by Parliament, almost *sub silentio*) could impute to them a deliberate intention covertly to alter the substance of the law as to the vestures of the clergy (which they had in the Conference declared their intention to leave unchanged), by changes apparently verbal and trivial, in a Rubric possessing down to that time no legislative authority, and on which they themselves, as will be seen in the sequel, never meant to act, and never did act, in any such sense.

The declarations of the Legislature which bear upon this question are, (1) the recitals in the preamble of the Act of 1662, and in the second section of that Act; and (2) the preface to the Prayer Book.

The preamble of the Act of 1662 recites that the Commission on which the annexed book was founded had been ordered "for settling the peace of the Church, and for allaying the present distempers, which the indisposition of the time had contracted."

The restoration of vestures which had not been in use for nearly a hundred years, and had become associated, not in the popular mind only, with the idea of superstition, cannot well be supposed to have been contemplated by the Legislature as a change conducive to the peace of the Church, or to agreement within its pale, even when that pale might have been contracted by the secession of those from whom conformity was not to be looked for. And if it had been intended not merely to continue an existing and well-known state of things, but to revive usages long obsolete, and to prohibit all things previously in legal use, which were not prescribed by the First Book of King Edward, it can hardly have been expected that the desired certainty of rule, and agreement in practice, would have been attained by a vague reference to a Prayer Book not generally accessible.

Of the "Preface" to the Book of 1662 it is to be observed (1) that it

disallows, as without warrant in law, the practical interruption, during the Rebellion and the Protectorate, of the use of the Liturgy, "though enjoined by the laws of the land, and those laws never yet repealed;" (2) that none of the general reasons thereby assigned for the revision, and for the alterations then made, are such as to make it at all probable that for any of those reasons the old vestures would be restored; and (3) that a comparison of the new language with the old is thereby expressly invited, for the purpose of arriving at a just view of the reasons for particular changes: "If any man, who shall desire a more particular account of the several alterations in any part of the Liturgy, shall take the pains to compare the present Book with the former, we doubt not but the reason for the change may easily appear."

Entering then upon the comparison so invited, the first material observation is that, on the one hand, the Statute 1 Elizabeth, cap. 2, is reprinted at the beginning of the book as an unrepealed and effective law, and, indeed, is transcribed in the Manuscript Book approved and signed by the two Convocations; and, on the other hand, the Ornaments Rubric of 1662 occupies the same place, and *primâ facie* retains the same general office and character which it had in the former book, in which (as has been already said) it was a note of reference to an external law, namely, that contained in the 25th section of the Statute, still printed at the beginning of the book. Their Lordships cannot look upon this Rubric as being otherwise than what it was before, a memorandum or note of reference to that law. Except for its new Parliamentary authority (which is a matter scarcely entering into the comparison of the old with the new language), it would certainly be so. It is true that the former express reference to the Act of Elizabeth at the end of the Rubric is omitted. But, on the other hand, the Act itself is exhibited as a law still in force, and the effect and the obvious purpose of all the changes in the wording of the Rubric (with a single exception) is to make it, as far as it goes, a mere extract from, and a simple repetition of the words of, that Act. The important words of the Act, "until other order shall be therein taken," &c., are not now for the first time left out; the former Rubric had also stopped short of them when it could not possibly control their legal effect. If the manuscript alterations in the handwriting of Sancroft acting as Cosin's Secretary (much dwelt upon by the Appellant's Counsel), could for this purpose be accepted as evidence, they would prove, as a matter of fact, that the change was made because (in the language of the manuscript) "these are the words of *the Act itself*." Their Lordships do not think that such evidence is admissible; but the same reason is legitimately to be inferred from the comparison suggested by the preface to the Prayer Book. It is easy to understand why the words of the Act should be as closely as possible adhered to, if those words, as found in that Act, were still the law authoritatively governing the matter. The words "shall be retained and be in use" were not in the former Rubric, but they were in the Statute. If intended as a mere extract from the Statute, or to continue and carry forward in 1662 the use of those things which were then actually, or in contemplation of law, in use under that Statute, they are apt and appropriate; but if it was meant to bring back an old and long-disused state of things, by making the Rubric of 1662, for that purpose, a new point of departure, which repealing the 25th section of 1 Elizabeth, cap. 2, and all that had been done under it, the substitution of this particular language for the words of the former Rubric, "the Minister shall use," &c., and the recurrence to the exact phraseology of the

enactment about to be superseded, would seem to be the most inappropriate way conceivable of accomplishing that object.

The only other alteration (which is also the single deviation in the Rubric of 1662, as far as it goes, from the language of the 25th section of 1 Eliz., cap. 2), is this. In that section the words were, "such ornaments of the Church and of the Ministers thereof shall be retained and be in use as was in this Church," &c. The Rubric in use before 1662 was that of 1559, as reprinted in the book of 1603-4, which said: "The Minister, *at the time of the Communion, and at all other times in his ministration*, shall use such ornaments in the Church as were in use," &c. In the Rubric of 1662 they are, "such ornaments of the Church, and of the Ministers thereof, at all times of their ministration, shall be retained and be in use as were in this Church," &c.; the words, "*at all times of their ministration*," being interpolated into the context, of which the rest is extracted from the Act of Elizabeth. What is the reason for this change, discoverable (according to the rule of the preface to the Prayer Book) from a comparison of the new language with the old? The old language (*i.e.*, that of the former Rubric) seemed to imply a distinction which really existed when it was used in 1559, between the ornaments of the minister at the time of the Communion and his ornaments at other times in his ministration, and the objection at the Savoy Conference as understood by Baxter (than whom no one was better acquainted with all that passed) seems to have been to an apparent recognition or admission of this distinction. That distinction, in all parish and non-collegiate Churches, had been abolished by the Advertizements and the practice under them. The new words (though not incapable of being read distributively, if and so far as such a distinction might still continue in law), ceased to imply, or to seem to imply, any such distinction. If the words of the Statute had been in this place simply followed, there would have been less force in the alteration; but these words, "at all times of their ministration," are put in as if to give emphasis to the change, and to direct attention to the fact that, in the then state of the law, the use of the same vestures by the Minister, at all times of his ministration, was the ordinary and the general rule. Such a change of language here would have been most extraordinary if it had been intended to recur in all the Churches of the kingdom to those distinctions to which the Advertizements had put an end, but which the terms of the former Rubric seemed to recognize. On the other hand, it was a natural change of language, if the object was to remove some part, at least, of the ground for the Puritan objection, that the former Rubric "seemed to bring back" the abolished vestures.

This explanation of the change is, in fact, the only one which is in harmony with or which could justify the note or list of alterations in the book now deposited in the Library of the House of Lords, "out of which was fairly written"* the Book of Common Prayer subscribed on the 20th of December, 1661, by the Convocations of Canterbury and York, and which book, so subscribed, was by those Convocations "exhibited and presented" to the King, and sent by the King to the House of Lords on the 25th of February, 1661—2. This original book, from which the transcript was thus made, contains the actual record of all alterations and additions made by the Convocations, clearly written in manuscript into a printed Prayer Book of 1636, and at the beginning a tabular list of the material alterations. It was delivered by the House of Lords to the House of Commons as the authority for the book "fairly written" which was to be referred to in the Act;*

* Lords' Journal, April 10, 1662.

and it is impossible to doubt that the tabular list of alterations contained in it was inserted for the purpose of enabling the changes which Parliament was asked to sanction to be well understood. This tabular list sets out in parallel columns all the material changes which had been made from the old form, among which no mention of the Rubric in question occurs, and there is then a note added in these words: "These are all ye materiall alterations, ye rest are only verbal, or ye changing of some Rubricks for ye better performing of ye Service, or ye new moulding some of ye Collects."

To repeal in 1662 the 25th section of the Statute of the 1st Elizabeth, and the order taken under its authority, would have required either a clear and distinct repealing enactment, or an enactment inconsistent and irreconcilable with the former law. It was admitted in the argument, and indeed could not be denied, that the Statute of Elizabeth was not repealed in terms; and it is in fact, as has been already observed, set forth as the first enactment in the new Prayer Book. The Statute is also beyond question one of those "good laws and statutes for the uniformity of prayer and administration of the Sacrament [s *sic*]," which by the 24th section of the Act of 1662 are declared to "stand in full force and strength, to all intents and purposes whatsoever for the establishing and confirming" of the new Book, and which are thereby directed to be "applied, practised, and put in use for the punishing of all offences contrary to the said laws, with relation to the Book aforesaid, and no other."

In order to judge whether there is anything inconsistent and irreconcilable between the Ornaments Rubric in the new Prayer Book and the 25th section of the older Statute, that section must be read as if the order taken under the section had been inserted in it. And, as so read, their Lordships see nothing inconsistent between the Rubric and the section. The Rubric served, as it had long previously served, as a note to remind the Church that the general standard of ornaments, both of the church and of the ministers, was to be that established by the authority of Parliament in 1549; but that this standard was set up under a law, still unrepealed, which engrafted on the standard a qualification that, as to the vestures of parish ministers, the surplice, and not the alb, vestment, or tunicle, should be used.

No doubt can be entertained that for nearly two centuries, succeeding 1662, the public and official acts of the Bishops and clergy of the Church, and of all other persons, were inconsistent with the supposition that the Rubric of 1662 had made any change in the law.

During the twenty-five years immediately succeeding the legislation of 1662, we have a series of Visitation Articles (those of fifteen Bishops and one Archbishop, of thirteen dioceses, printed either at length or by collation with Bishop Morley's form, in the Appendix to the Second Report of the Ritual Commissioners, pp. 609, 611, 615, 632, 639, 642, 645, 649, 653-4), which prove conclusively that those whose official duty it was to see the law observed, and of whose strictness in the performance of that duty the same Articles supply abundant evidence, understood the law still to be that the surplice was always to be used by the clergy officiating in the administration of the Holy Communion.

This list does not include any Articles of the year 1662 except those of Bishops Hacket of Lichfield and Henchman of Salisbury, who both expressly refer to the Act of Uniformity of that year. Upon the point in question, Bishop Hacket inquires in 1662 thus:—

"Have you a decent surplice, one or more, for your parson, vicar, curate,

or lecturer to wear in the time of all public ministrations? Hath he read the Book of Common Prayer as it is enjoined by the late Act of Uniformity for public prayer, administration of the Sacrament [s *sic*], &c., on some Sunday before the 24th August last past, and did and doth he wear the surplice while he performed that office and other offices mentioned in that Common Prayer Book?" (*Ibid.*, p. 609).

Bishop Henchman (*Ibid.*, p. 611) inquires:—

"Doth your minister, reading Divine Service, and administering the Sacraments, and other rites of the Church, wear the surplice according to the Canons?"

Subsequently, in 1663, 1664, 1666, 1671, 1672, 1674, 1676, 1677, 1679, 1683, and 1686, Articles to the same effect, in different forms, but all equally cogent, were administered by the other prelates, whose Visitations have been referred to. Bishop Morley's form, adopted by nine other prelates in those years, and used by himself in 1674 (as he and nine others had also used it in 1662, when the form of the Revised Rubric had been settled by the two Convocations, but before it became law), is this:—

Art. 5 (concerning churches, &c.):—"Have you a comely, large surplice for the minister to wear at all times of his public ministration in the Church?"

Art. 7 (concerning ministers):—"Doth your minister, at the reading or celebrating any Divine Office in your church or chapel, wear the surplice together with such other scholastical habit, as is suitable to his degree? (*Ibid.*, p. 615.)

Bishop Henchman, in 1664 (then translated to London), and Bishop Pearson of Chester, in 1674, used this form:—

Art. 7 (concerning churches, &c.):—The same as Bishop Morley's.

Art. 4 (concerning ministers):—Doth your minister, in the Morning and Evening Service, in the administration of the Sacraments, and in performing other religious offices appointed by the Church of England, use the respective forms in the Book of Common Prayer, together with all those rites and ceremonies which are enjoined in this Church; and doth he make use of the surplice when he reads Divine Service or administers the Sacraments?" (*Ibid.*, pp. 632, 642.)

Bishops Morley and Henchman were two of the three Prelates (Archbishop Sheldon being the third) who are stated by Baxter* to have "managed all things" at the Savoy Conference. Archbishop Sheldon, in his Circular Letter to the officials of his diocese in 1670,† directs them to require that all parsons, vicars, and curates, "in the time of their officiating, ever make use of and wear their priestly habit, the surplice and hood."

Archbishop Sancroft, in 1686, also used Bishop Morley's form under the head "Concerning churches;" and, under that "Concerning the Clergy," his 7th Article runs thus:—

"Doth your parson, vicar, or curate read Divine Service on all Sundays, and publicly administer the holy Sacraments of Baptism and the Eucharist, and perform all other ministerial offices and duties, in such manner and form as is directed by the Book of Common Prayer lately established, and the Act of Uniformity therewith published . . . . without addition, diminution, or alteration? And doth he in those his ministrations wear the surplice, with a hood or tippet befitting his degree?" (*Ibid.*, p. 654.)

* Life and Times, 171-2.

† 2 Card. Doc. An., 276-9.

It was not disputed at the Bar that the subsequent practice in parish and non-collegiate churches till about 1840 or later was uniformly consistent with this view of the law.

As public declarations of what was understood to be the state of the law shortly after the completion of the Revision in 1662, their Lordships may refer in the first place to the statement of Bishop Sparrow. Sparrow was Bishop of Exeter in 1684. He had been one of the Commissioners at the Savoy Conference. In 1655 he published his "Rationale" of the Book of Common Prayer, which then contained nothing as to the Ornaments Rubric or the ornaments of the minister. In 1684, after the Revision, he published a new edition, and thus (p. 337) states the law as then understood. "The minister in time of his ministration shall use such ornaments as were in use in the 2nd Edward VI, Rubric 2:—viz., a surplice in the ordinary ministrations, and a cope in time of ministration of the Holy Communion in Cathedral and Collegiate churches.—Queen Elizabeth's Articles, set forth in the seventh year of her reign."

Their Lordships may further refer to the alterations proposed by the Commissioners of 1689 appointed to revise the Prayer Book, with a view to the relief of Dissenters.* The Rubric proposed by them to be substituted for the Ornaments Rubric may be taken to be a statement of what at that time was understood to be the state of the law: "*Whereas the surplice is appointed to be used by all ministers in performing Divine Offices*, it is hereby declared that it is continued only as being an antient and decent habit. But if any minister shall declare to his Bishop that he cannot satisfye his conscience in the use of the surplice, in that case the Bishop shall dispense with his not using it," &c.

And the "Bill of Comprehension" introduced into Parliament by the King's authority about the same time contained a clause† framed on the same principle.

It is abundantly clear that, if any person had imagined that the Prayer Book of 1662 introduced a change on this subject, there were very many who would gladly have acted on it. No instance has been given of any person having acted on it. On the other hand, every one continued to act according to the old law, although, if the argument of the Appellant is correct, every one in so doing was acting illegally. The practice,—consistent with the old law, inconsistent with the argument of the Appellant,—has been uniform, open, continuous, and under authoritative sanction.

What, then, in a question of this nature, is the weight in law of such contemporaneous and continual usage? Their Lordships may take the answer to this question from the words, either of Lord Campbell, in Gorham *v* Bishop of Exeter‡; or of Chief Baron Pollock in Pochin *v* Duncombe‖; or of Dr. Lushington in Westerton *v* Liddell.§

Lord Campbell, referring to a Statute of 25 Henry VIII, cap. 19, said:—

"Were the language of the Statute obscure, instead of being clear, we should not be justified in differing from the construction put upon it by con-

* Ho. of Com. Papers, vol. 36 (1854).

† MS. in Burnet Papers, Cardw, Conf., p. 457.

‡ 15 Q.B., 73, 74. ‖ 1 H. and N. 856.

§ Moore, separate Report, 79.

temporaneous and long-continued usage. There would be no safety for property or liberty, if it could be successfully contended that all lawyers and statesman have been mistaken for centuries as to the true meaning of an old Act of Parliament."

Chief Baron Pollock, with reference to the maxim—"*Contemporanea expositio fortissima est in lege*," said:—

The rule amounts to no more than this, that if the Act be susceptible of the interpretation which has thus been put upon it by long usage, the Court will not disturb that construction."

Dr. Lushington said:—

"Usage, for a long series of years, in ecclesiastical customs especially, is entitled to the greatest respect; it has every presumption in its favour; but it cannot contravene or prevail against positive law; though, where doubt exists, it might turn the balance."

A Church Rubric, taking the form of directions to be acted on by large numbers of persons from week to week, and from day to day, is a subject above all others for exposition by contemporaneous and continual usage, and the principles laid down in the cases to which their Lordships have referred, fortified as they easily might be by many other authorities, seem to their Lordships to be decisive of the present question.

What their Lordships have already said is sufficient to show that, in their opinion, according to the ordinary principles of legal construction and interpretation, the Ornaments Rubric of 1662, on the subject of the vestures of ministers, cannot, any more than the Rubric on the same subject which preceded it, be looked at otherwise than in connection with the Statute of the 1st of Elizabeth, cap. 2. They may, however, also point out a singular incongruity which might arise from looking at it unconnected with the Statute. The Rubric states that such ornaments of the ministers, at all times of their ministration, shall be retained and be in use as were in the Church by authority of Parliament in 1549, that is, under the First Prayer Book of Edward VI. But under the Book of 1549, the Rubric as to the vestures in the Communion Service is confined to that office, and the general Rubric at the end of the Book is confined to the saying, or singing, of Matins and Evensong, baptizing, and burying. There does not, therefore, appear in the Book of 1549 to be any imperative direction as to the use of the surplice or any other vesture in the Marriage Service, in the churching of women, or by ministers assisting the Bishop in the office of Confirmation, in the Commination Service, or in the saying of the Litany, which in that Book was not connected with Matins or Evensong. These omissions, however, were filled up by the Advertizements issued under the Statute which provided that every minister saying any public prayers, or ministering the Sacraments, or other rites of the Church, should wear a comely surplice. If, therefore, the Act and the Advertizements are read in connection with the Rubric, the use in the latter of the words "at all times of their ministration" may be justified: whereas those words would be inaccurate if applied merely to the Prayer Book of 1549.

The learned Counsel for the Appellant, in the course of their argument, placed considerable reliance on passages in certain books published during the 18th, and in the present, centuries by writers who, however learned, were not entitled to speak with any legal authority, and some of whom appear to have expressed opinions adverse to the legality of the usage as to the

vestures of clergymen, which they admit prevailed up to and at the time at which they wrote.

It would, in the opinion of their Lordships, be contrary to well-settled principles of law to admit private opinions to control the legal interpretation of public documents, or the legal inferences from public acts or usage; but it may be not without advantage to point out the circumstances under which the opinions of these writers appear to have been expressed.

One of the books referred to by the Appellant's Counsel was Dr. Thomas Bennett's "Paraphrase, with Annotations upon the Book of Common Prayer." The second edition of this book was published in 1709, and the earlier edition (the date of which their Lordships have not observed) must have been still nearer the year 1662. Both editions were published before Cosin's Notes on the Prayer Book were printed, and their Lordships will, in the first place, refer to those notes, and to the writers who followed.

Three sets of Notes on the Prayer Book, (as it stood before 1662), by Cosin, were published by Nicholls in 1710, the first set being supposed to have been written by Cosin some time before, and the two others at different times after, 1630, but all before the revision of 1662.

In the first Notes* he had originally suggested that the clergy, as the law then stood, were "all still bound to wear albs and vestments, howsoever it was neglected;" and that the 14th and 58th Canons of 1603-4 were inconsistent with each other. But perceiving, some time afterwards (at what time afterwards is uncertain) that he had, in making that Note, overlooked the terms of the Statute (1 Eliz., cap. 2, sec. 25), he added: "But the Act of Parliament, I see, refers to the Canon, and until such time as other order shall be taken."

In another passage of the same set of Notes (*Ibid.* p. 90), he had distinctly recognized the authority of those Articles of the Advertizements which relate to this matter, as a due exercise of the powers given to the Crown by that Statute, with reference to a point which might depend on section 26 rather than on section 25. "For cathedral churches," he there says, "it was ordained by the Advertizements in Queen Elizabeth's time (that authority being reserved, notwithstanding this book, by Act of Parliament), that there should be an Epistoller and Gospeller, besides the Priest, &c." And, in the execution of his official duty as Archdeacon of the East Riding of York, in 1627, he administered to the churchwardens then under his jurisdiction very stringent articles (not adopted without change from forms previously in use, but revised and altered under his own hand), in which the use of the surplice by the parochial clergy, when administering the Sacraments, was treated as legally necessary, and never to be omitted.† In his later Notes, and also in his suggested corrections of the Prayer Book, he repeated the view which had been expressed in the uncorrected form of his first Note, giving, however, no reason for that opinion, except such as may be inferred from a passage at p. 233 of vol. 5 of his "Works," where, after quoting the words of 1 Eliz., cap. 2, sec. 25, he says: "which other order, *so qualified as is here appointed to be*, was never yet made."

From this it may be concluded that Cosin's opinion at that time was founded either on some technical view of the informality of the Advertizements, or on some conclusions as to matters of fact, with respect to which (as

* Cosin's Works, vol. 5. p. 42.

† See his Correspondence, published by the Surtees Society, vol. 1, p. 106; and Preface; also "Works," vol. 2, p. 9.

they involved no question of peculiar ecclesiastical learning) his authority was certainly not greater than that of any other man.

After the Restoration, Cosin was made Bishop of Durham; and in his Visitation Articles of 1662, already mentioned (which may be assumed, according to the Appellant's argument, to have been anterior to St. Bartholomew's Day in that year), he still considered it to be his duty to treat the use of the surplice in the administration of both Sacraments as matter of legal obligation on all the parochial clergy.

The result appears to be that the opinions recorded in the private Notes of this divine, at different periods of his life, are not consistent with each other; while those of them which are adverse to the validity of the Advertizements are inconsistent with his official acts done in the exercise of a legal jurisdiction, and in the discharge of his public duty, both before and afterwards.

The private Notes of Cosin, however, originally written before 1662, and made known to the public half a century or more after they were written, appear to have been adopted without much examination by writers who followed. Bishop Gibson, in the "Codex" published in 1713, apparently echoing Cosin's words, says:—

"Which other order (at least in the method prescribed by this Act) was never yet made; and, therefore, *legally*," (the *italics* are Gibson's) "the ornaments of ministers, in performing Divine Service, are the same now as they were in 2 Edw. VI."

Burn, in his Ecclesiastical Law, follows Gibson, as Gibson had followed Cosin. Dr. Cardwell, the last author cited, erroneously supposed that there was a judicial decision which had established that an instrument under the Great Seal was necessary for a due execution of the Parliamentary power, and, for that reason only, he concluded that the Book of Advertizements had not the force of law.*

Their Lordships will now refer to the opinion expressed by the other author, Bennett, already mentioned, whose work was published before Cosin's Notes were made public.

He states† the Rubrics of 1549, 1559, and 1662, and then proceeds thus:—

"From hence it seems to follow that the present Rubric, and that of Queen Elizabeth, which are in effect the very same, do restore those ornaments which were abolished by King Edward VI's Second Book, and which, indeed, have been disused ever since that time. But it must be considered that in the latter part of the Act of Uniformity, 1 Eliz., there is this clause, ('*until other order*,' &c.); this clause explains Queen Elizabeth's Rubric, and, consequently, the present one, which is, in reality, the same. So that those ornaments of the Church and its ministry which were required in the second year of King Edward were to be retained till the Queen (and, consequently, any of her successors), with the advice before specified, should take other order. Now, such other order was accordingly taken by the Queen in the year 1564, which was the seventh of her reign. For she did then, with the advice of her Ecclesiastical Commissioners, particularly the then Metropolitan, Dr. Matthew Parker, publish certain Advertizements, wherein are the following directions":—

He then quotes the Advertizements, and afterwards states the Canons.

"From hence 'tis plain that the parish priests (and I take no notice of the

* Cardwell, Confer., p. 38, note.

† Paraphrases with Annotations upon the Book of Common Prayer, 2nd edition, pp. 4. 5.

case of others) are obliged to use no other ornaments but surplices and hoods. For these are authentic limitations of the Rubric, which seems to require *all* such ornaments as were in use in the second year of King Edward's reign. Besides, since from the beginning of Queen Elizabeth's reign down to our own times, the disuse of them has most notoriously been allowed; therefore, though it were not strictly reconcilable with the letter of the Rubric, yet we cannot be supposed to be under any obligation to restore the use of them. And, indeed, if that practice which our Governors do openly and constantly permit and approve be not admitted for a good interpretation of laws, whether ecclesiastical or civil, I fear it will be impossible to clear our hands of many repugnances of different kinds besides this under debate."

It only remains to consider the bearing on this part of the present case of the former decisions of the Judicial Committee in Liddell *v.* Westerton, and Martin *v.* Mackonochie.

As to Liddell *v.* Westerton, every thing said and done in that case to which the Rubric of 1662 was material, had reference exclusively to ornaments of the Church. The Court had "nothing to do with the ornaments of the minister or anything appertaining thereto."—(Moore's separate Report, p. 31). The questions whether the power of the Crown, under the 1st Elizabeth, cap. 2, sec. 25, had ever been duly exercised, and (if so) with what effect; whether the Rubric of 1662 was to be read with that section, as a law still in force, or not; what would be the effect of so reading it, and whether any aid towards the solution of those questions might be derivable from usage, either before or after 1662, and what such usage had been, were none of them before Dr. Lushington, or the Court of Arches, or the Judicial Committee. It was not suggested that anything had ever been done under the 1st Elizabeth, cap. 2, sec. 25 as to any "Ornaments of the Church." Under these circumstances it was sufficient, as well as most convenient, to refer to the Rubric, and to that alone; the effect of which was, as to that matter, simply coincident and identical with that of the section in the Act of Elizabeth, assuming it to be then in force.

It is perfectly consistent that the Rubric should speak with the authority of the Statute, so far as the language and effect of both are identical, and yet should not supersede or control the operation of that part of the Statute which it does not in terms repeat.

It is true that Dr. Lushington did, in more than one passage of his Judgment, signify his assent to what he described as the "irresistible argument that the last Statute of Uniformity, by referring to the First Book of Common Prayer of Edward VI, excluded not only the Second Book but everything else effected in the interval between 1549 and 1662, whether by Act of Parliament or Canon, which could or might have altered what existed in 1549; and consequently that nothing done from 1549 to 1662, however lawful during that period, had in itself force or binding authority after the Statute of 1662 came into operation." Everything which fell from that very learned Judge is entitled to most respectful consideration; but he had not been (as their Lordships now have been) upon the path of inquiry which was really necessary to support or to disprove that proposition.

Nothing to the same effect is to be found in the Judgment of the Judicial Committee, which overruled that part of Dr. Lushington's Judgment in which these *dicta* occur, reversing his decision and that of the Court of Arches as to the crosses not connected with the Communion Table; and also rejecting as erroneous his view of the meaning of the words "orna-

ments of the church" as used in the Rubric; which view had nevertheless been held in both the Courts below to be clear and indisputable.

There is, however, in the Judgment of the Judicial Committee, delivered by Mr. Pemberton Leigh, the following passage, which has been much relied on by the Appellant:—

"It will be observed that this Rubric (that of 1559) does not adopt precisely the language of the Statute, but expresses the same thing in other words. The Statute says: 'such ornaments of the church, and of the ministers thereof, shall be retained and be in use;' the Rubric 'that the minister shall use such ornaments in the Church.' The Rubric to the Prayer Book of January 1, 1604, adopts the language of the Rubric of Elizabeth. The Rubric to the present Prayer Book adopts the language of the Statute of Elizabeth. But they all obviously mean the same thing; that the same dresses, and the same utensils, or articles which were used under the First Prayer Book of Edward VI, may still be used. None of them, therefore, can have any reference to articles not used in the services, but set up in churches as ornaments in the sense of decorations."

This passage has been the subject, as it appears to their Lordships, of remarkable misconception. It was sufficient for the purpose of the question as to crosses then before the Judicial Committee, to consider only the meaning of the exact words of the Rubric itself, standing alone, and the words corresponding to them which were found in the Statute of Elizabeth and the Rubric of 1559; and to do this with a view only to the interpretation of the two particular phrases, "ornaments of the church," and "by authority of Parliament in the second year of the reign of King Edward VI." For that purpose of verbal exposition the statement in this passage of the Judgment (with the exception of a somewhat inaccurate expression as to the Rubric of 1604), was unexceptionably correct. The words of the Rubric of 1662, standing alone, and the corresponding words in the Statute of Elizabeth and the Rubric of 1559 and 1604, do mean what is there stated, neither more nor less. In the Act of Elizabeth there are other and further words, the effect of which, if still in force, is in the present case very important; but in that part of the Judgment of Liddell *v.* Westerton, any examination of the effect of those words, or of the questions arising out of them with reference to any ornaments of the ministers of the Church, would have been absolutely irrelevant. Judges weigh their words with reference to the questions which they have to consider, and not with reference to questions which are not before them. If what was then said could properly be applied to a purpose not then in contemplation, the statement that the words of the 25th section of the Act of Elizabeth, the Rubric of 1559 and 1604, and the Rubric of 1662, "all obviously mean the same thing," might more reasonably be alleged in proof that the Judical Committee thought the words "according to the Act of Parliament set forth in the beginning of this Book," or the words "until other order taken therein," &c., were still implied at the end of the Rubric of 1662, than the succeeding words can be relied on to show that they held all the vestures of the clergy prescribed by the First Book of King Edward to be lawful at all the three epochs referred to—1559, 1604, and 1662.

With respect to the decision of the Judicial Committee in Martin *v.* Mackonochie little need be said. There, too, it was sufficient to consider the effect of the mere words of the Rubric of 1662, repeating (as it did) in 1662 the language of the Act of the first year of Elizabeth, on a point unaffected

by anything done in the meantime. The points determined in Liddell *v* Westerton are succinctly stated, approved, and followed. There is no reference to the particular passage, in the Judgment of Liddell *v.* Westerton, on which the Appellant's Counsel rely; though if there had been, their Lordships would have been of opinion, for the reasons already stated, that the present question would be in no way affected by it.

Their Lordships, for these reasons, which, out of respect for the elaborate arguments so earnestly addressed to them, and not from any hesitation as to the decision at which they should arrive, they have expressed at a length greater than is usual, are of opinion that the decision of the learned Judge of the Arches Court as to the vestments worn by the Appellant, following that of this Committee in Hebbert *v.* Purchas, is correct, and ought to be affirmed.

Their Lordships will now proceed to consider the charge against the Appellant with reference to his position during the Prayer of Consecration.

The allegation upon that head is that the Appellant, when officiating in the Service of the Holy Communion, unlawfully stood, while saying the Prayer of Consecration in the said Service, at the middle of the west side of the Communion Table, such Communion Table then standing against the east wall, with its shorter sides towards the north and south, in such wise that during the whole time of his saying the said prayer he was between the people and the Communion Table with his back to the people, so that the people could not see him break the bread or take the cup in his hand.

The rule by which the position of the minister during the celebration of the Holy Communion is to be determined must be found in the Rubrical directions of the Communion Office in the Prayer Book, there being, as to this matter, nothing in any Statute to control or supplement those directions.

In examining these directions, their Lordships propose to put aside the argument, very much pressed upon them, that the proper and only proper position for the Communion Table is in the body of the church, or in the middle of the chancel, and that is in a wrong position when placed, at the time of the Communion Service, along the east wall. They think this argument has no sufficient foundation. No charge is made that in the church of the Appellant the Communion Table stood where it ought not to have stood, and in the opinion of their Lordships, no such charge could have been sustained.

The Rubric, indeed, contemplates that the Table may be removed at the time of the Holy Communion; but it does not, in terms, require it to be removed. Morning and Evening Prayer are, according to one of the early Rubrics of the Prayer Book, to be used in the accustomed place of the church, chapel, or chancel. In churches where it is customary to use both the chancel and body of the church, or the chancel alone, for Morning and Evening Prayer, the direction that the Table shall stand "where Morning and Evening Prayer are appointed to be said," is satisfied without moving it. That direction cannot be supposed to mean that the position of the Table is to be determined by that of the minister's reading-desk, or stall only, the service being "used" and "said" by the congregation as to the part in it assigned to them, as well as by the minister. The practice as to moving or not moving the Table has varied at different times. It was generally, if not always, moved, in the earlier part of the post-Reformation period. When the revision of 1662 took place, and when the present Rubric before the Prayer of Consecration was for the first time introduced, it had come to be the case that the Table was very seldom removed. The instances in which it has

been removed may be supposed from that time to have become still more rare; and there are now few churches in the kingdom in which, without a structural rearrangement, the Table could be conveniently removed into the body of the church. The utmost that can be said is, that the Rubrics are to be construed so as to meet either hypothesis.

Their Lordships have further to observe that the Rubrics assume that, before the Prayer of Consecration is reached, those who intend to communicate will have drawn near to the Communion Table, wherever it may be placed, so as to concentrate the Communicants near it or round it, and thus enable them to witness the ministration more easily than if they had remained in their places throughout the church.

It is proper also to point out that the term "east" or "eastward" nowhere occurs in the Rubrics. From the mention that is made of the north side, it seems to be supposed that in all churches that expression would represent a uniform position, and there is no doubt that from the almost universal eastward position of churches in England this would be the case; but the north is the only point of the compass which is actually referrred to.

During several portions of the Communion office the minister is directed, either expressly, or by reference or implication, to stand at the north side of the Table. Where this is the case their Lordships have no hesitation in saying that whether the Table is placed altar-wise along the east wall, or standing detached in the chancel or church, it is the duty of the minister to stand at the side of the Table which, supposing the church to be built in the ordinary eastward position, would be next the north, whether that side be a longer or shorter side of the Table. No doubt in a certain context the word "side" might be so used as to be shown by that context to be contra-distinguished from the top, or bottom, or end of a subject of quadrilateral or any other figure. But for this purpose a determining context is necessary. In the absence of such a context it is accurate, both in scientific and in ordinary language, to say that a quadrilaterial table has four sides. In the Rubrics not only is there no context to exclude the application of that term to the shorter as well as the longer sides; but the effect of the context is (as it appears to their Lordships) just the reverse. The direction is absolute, and has reference to one of the points of the compass, which are fixed by nature; the figure and the position of the Table are not fixed either by nature or by law; and the purpose of the direction is to regulate, not one part or another of the Table, but the position of the minister with reference thereto. Under these circumstances, it seems extravagant to put on the word "side" a sense more limited than its strict and primary one, for the purpose of suggesting difficulties in acting upon the rule, which for nearly two centuries were never felt in practice, and which would not arise if the strict and primary sense were adhered to.

If it were necessary that there should be extracted from the Rubrics a rule governing the position of the minister throughout the whole Communion office, where no contrary direction is given or necessarily implied, the rule could not, in their Lordships' opinion, be any other than that laid down in Hebbert *v.* Purchas; and they entertain no doubt that the position which would be required by that rule—a position, namely, in which the minister would stand at the north side of the Table, looking to the south—is not only lawful, but is that which would, under ordinary circumstances, enable the minister, with the greatest certainty and convenience, to fulfil the requirements of all the Rubrics. The case, however, with which their Lordships

have to deal is one which may assume the character of a penal charge. It might be a penal charge against the present Appellant that he has stood, during the Prayer of Consecration, on the west side of the Table; and on the other hand, on a construction of the Rubric the opposite of that contended for by the Respondents, a penal charge might be maintained against a priest who stood at the north side. It is therefore necessary to be well assured, both that there is a direction free from ambiguity that the priest should stand, during this particular Prayer, either at the north or at the west side, and also that no other test is supplied by the Rubric in question which would be a sufficient and intelligible rule for the position, at that part of the service, of the priest.

Their Lordships have therefore to consider the precise wording of the Rubric preceding the Prayer of Consecration taken in connection with the Prayer itself.

It is to be observed that the Revision in 1662 introduced for the first time the breaking of the bread as one of the manual acts to be done during the prayer of Consecration, and that, although some of the other manual acts, namely, the taking the bread and the cup into the priest's hands, had been mentioned in the Rubric of the First Prayer Book of Edward VI, they had not been contained in the Second Prayer Book of that Sovereign, or in the Prayer Books of Elizabeth or James I. The Rubric "That he may with the more readiness and decency break the bread before the people," &c., was also new; and it is not impossible that one of the reasons for its introduction may have been to meet one of the demands or suggestions of the Puritan party, who had proposed a form of service in which the priest was to be ordered to break the bread in the sight of the people."*

Their Lordships are of opinion that the words "before the people," coupled with the direction as to the manual acts, are meant to be equivalent to "in the sight of the people." They have no doubt that the Rubric requires the manual acts to be so done, that, in a reasonable and practical sense, the Communicants, especially if they are conveniently placed for receiving of the Holy Sacrament, as is presupposed in the office, may be witnesses of, that is, may see them. What is ordered to be done before the people, when it is the subject of the sense, not of hearing, but of sight, cannot be done before them unless those of them who are properly placed for that purpose can see it. It was contended that "before the people" meant nothing more than "in the church;" to guard against an anterior and secret consecration of the elements. But if the words "before the people" were absent, the manual acts, and the rest of the service, could not be performed elsewhere than in the church, and in that sense *coram populo*, nor could the Sacrament be distributed except in the place and at the time of its consecration: and this argument would, therefore, reduce to silence the words "before the people," which are an empathic part of the declaration of the purpose for which the preparatory acts are to be done. That declaration applies not to the service as a whole, nor to the consecration of the elements as a whole, but to the manual acts, separately and specifically.

There is, therefore, in the opinion of their Lordships, a rule sufficiently intelligible to be derived from the directions which are contained in the Rubric as to the acts which are to be performed. The minister is to order the elements "standing before the Table:" words which, whether the Table stands "altarwise" along the east wall, or in the body of the church or chancel, would be fully satisfied by his standing on the north side and look-

* 4 Hall. Reliq. Liturg.

ing towards the south; but which also, in the opinion of their Lordships, as the Tables are now usually, and in their opinion lawfully, placed, authorize him to do those acts standing on the west side and looking towards the east. Beyond this and after this there is no specific direction that, during this prayer, he is to stand on the west side, or that he is to stand on the north side. He must, in the opinion of their Lordships, stand so that he may, in good faith, enable the Communicants present, or the bulk of them, being properly placed, to see, if they wish it, the breaking of the bread, and the performance of the other manual acts mentioned. He must not interpose his body so as intentionally to defeat the object of the Rubric and to prevent this result. It may be difficult in particular cases to say exactly whether this rule has been complied with; but where there is good faith the difficulty ought not to be a serious one; and it is, in the opinion of their Lordships, clear that a protection was in this respect intended to be thrown around the body of the Communicants, which ought to be secured them by an observance of the plain intent of the Rubric.

In applying these principles to the present case, their Lordships find that some difficulty has arisen from the circumstances under which the evidence was taken. The charge against the Appellant was a twofold one; both that he had stood at the middle of the west side with his back to the people, and that the people could not see him break the bread or take the cup in his hand. The witness Nicholson undoubtedly states that, at the service of which he speaks, while sitting in the nave, he could not see the Appellant perform the manual acts; and the witness Bevan gives evidence to the same effect. But with regard to Nicholson, he explains, as their Lordships understand his evidence, that, whether persons could see what the Appellant was doing would depend on whether they were sitting immediately behind him or were sitting on one side or the other; and with regard to Bevan, he states that, what would have prevented a man who sat at the side from seeing what the Appellant did, was, that he had on a chasuble, "which is a sort of cloak which spreads his body out."

When the Appellant himself was examined, he does not appear to have been asked any question on the subject; and the inference which their Lordships draw from the whole examination is, that inasmuch as at that time it was understood to be the law, founded on the decision in Hebbert *v.* Purchas, that the standing on the west side of the Table was, of itself and without more, unlawful, neither party thought it important to carry the evidence with any precision beyond this point, the Respondents thinking they had established their case, and the Appellant not being prepared to dispute the fact of the position in which he stood.

Their Lordships are not prepared to hold that a penal charge is established against the Appellant merely by the proof that he stood while saying the Prayer of Consecration at the west side of the Communion Table, without further evidence that the people could not, in the sense in which their Lordships have used the words, see him break the bread or take the cup into his hand, and they will therefore recommend that an alteration should be made in the Decree in this respect.

Their Lordships, before leaving this part of the case, think it right to observe that they do not consider the Judgment in the case of Martin *v.* Mackonochie to have any material bearing on the question now before them. The decision in that case was that the Priest must stand during the Prayer of Consecration, and not kneel during a part of it. The correctness of that

decision has not been, and, as their Lordships think, cannot be, questioned. Nothing is more clear throughout the Rubrics of the Communion office than that when the priest is intended to kneel, an express provision is made on the subject. The conclusion, however, in Martin *v.* Mackonochie, is expressed, perhaps, more broadly than was necessary for the decision. What was obviously meant was that the posture of standing was to be continued throughout the whole of the prayer. Nothing was or could be decided as to the place in which the priest was to stand, for that question was not raised, and was not in any manner argued, in the case.

Their Lordships will now proceed to the charge as to wafer or wafer-bread. The charge as to this is "that the Appellant used in the Communion Service and administration wafer-bread or wafers, to wit, bread or flour made in the form of circular wafers instead of bread such as is usual to be eaten." And this is traversed by the Appellant.

It appears that the allegation is in the same form as that used in the Purchas case; but in that case the Defendant did not appear, and no criticism seems to have taken place as to the form of the allegation or its sufficiency.

It is probable that the allegation was meant to raise the question as to the legality of the wafer, as distinguished from bread of the kind "usual to be eaten," and there are certainly some indications that the Appellant and his Counsel so understood, and meant to meet, the charge.

A different view has, however, been taken by the Counsel for the Appellant on the Appeal, and they have maintained that there is no averment that the wafer, as distinguished from bread ordinarily eaten, was used. They contend that the charge goes to the shape, and not to the composition, of the substance.

Their Lordships are of opinion that this objection must prevail. The charge, in their opinion, is consistent with the possibility of it having been the fact that bread "such as is usual to be eaten," but circular, and having such a degree of thinness as might justify its being termed wafers, was what was used. And if this is what was used, their Lordships do not think it could be pronounced illegal.

As, however, the question of the construction of the Rubric has been raised on this Appeal, as it was in the Purchas case, their Lordships think it right to express their opinion upon it, at the same time that they give the Appellant the benefit of the ambiguity which exists in the form of the charge.

It is to be observed that the Rubric does not in any part of it use the term "wafer." The words are "bread:" "bread such as is usual to be eaten," and "the best and purest wheat bread that conveniently may be gotten."

Their Lordships have no doubt that a wafer, in the sense in which the word is usually employed, that is, as denoting a composition of flour and water rolled very thin and unleavened, is not "bread such as is usual to be eaten," or "the best and purest wheat bread that conveniently may be gotten."

The only question on the construction of the Rubric is that raised upon the words "it shall suffice."

There is no doubt that in many cases these words standing alone, and unexplained by a context, would be quite consistent with something different from, larger or smaller, more or less numerous, more or less costly, than what is mentioned, being supplied.

Here, however, the sentence commences with the introduction: "To take away all occasion of dissension and superstition, which any person hath or

might have concerning the bread, it shall suffice," &c. These words seem to their Lordships to make it necessary that that which is to take away the occasion of dissension and superstition should be something definite, exact, and different from what had caused the dissension and superstition. If not, the occasion of dissension remains, and the superstition may recur. "To suffice," it must be as here described. What is substantially different will not "suffice."

The Rubric, which orders that the bread and wine shall be provided by the curate and churchwardens at the charges of the parish, seems to contemplate ordinary bread as the only material to be used, and the 20th Canon is still more precise in the same direction.

The former Rubric (of 1552, 1559, and 1604) had said, "It shall suffice that the bread be such as is usually to be eaten at the table with other meats, but the best and purest wheat bread that conveniently may be gotten." Queen Elizabeth's Injunction of 1559 on the same subject (in its form mandatory, and acted upon for many years afterwards) was issued when this Rubric had the force of law, and must be understood in a sense consistent with, and not contradictory to, it. That Injunction distinguishes between* "the sacramental bread" and "the usual bread and wafer, heretofore named singing cakes, which served for the use of the private mass;" directing the former to be "made and formed plain, without any figure thereupon, and of the same fineness and fashion round" as the latter, but "to be somewhat bigger in compass and thickness." The form, and not the substance, is here regulated. To order the use of the substance properly called "wafer," which was not "bread such as is usual to be eaten at the table" would have been directly contradictory to the Rubric; and this cannot be supposed to have been intended.

There was evidently "dissension" on this subject, and some diversity of practice, in the reign of Elizabeth. It appears from passages in the Fourth Book of the "Ecclesiastical Polity,"† published in 1594, that Hooker considered the use, either of leavened or of unleavened bread, to be at that time lawful. But the point was one as to which controversy then existed, and had given occasion to strife. In 1580, Chaderton, Bishop of Chester, acting as Commissioner in Lancashire, under the Crown, applied to the Privy Council for instructions as to "two special points worthy of reformation;" one of which was "for the Lord's Supper, with wafers, or with common bread?" The Lords of the Council replied (26th July, 1580) that they thought both points ought to be referred to the consideration of Parliament; adding:—"In the mean time, for the appeasing of such division and bitterness as doth and may arise of the use of both these kinds of bread, we think it meet, that in such parishes as do use the common bread, and in others that embrace the wafer, they be severally continued as they are at this present. Until which time, also, your Lordship is to be careful, according to your good discretion, to persuade and procure a quietness amongst such as shall strive for the public maintaining either of the one or the other."‡

In a later letter, the Bishop recurred to the same question, and was thus answered (21st August, 1510), by Lord Burghley and Sir Francis Walsingham:—"Concerning the last point of your letter, contained in a postscript,

* 1 Card. Doc. Ann., 202.

† 1 Hooker's Works by Keble, 6th edition, pp. 449-451.

‡ Peck's "Desiderata Curiosa," p. 91.

whereby appeareth that some are troubled about the substance of the Communion bread it were good to teach them that are weak in conscience, in esteeming of the wafer bread, not to make difference. But, if their weakness continue, it were not amiss, in our opinions, charitably to tolerate them, as children with milk. Which we refer to your Lordship's better consideration."*

In 1584, Bishop Overton, of Lichfield, issued an Injunction to the clergy of his diocese:—"That the Ordinance of the Book of Common Prayer be from henceforth observed in this, that the bread delivered to the communicants be such as is usual to be eaten at the table with other meats, yet of the purest and finest wheat; and no other bread to be used by the minister, nor to be provided for by the Churchwardens and parishioners, than such finest common bread."†

The 20th Canon of 1603-4, already mentioned, seems to have proceeded on the same view of the law; and, after the passing of that Canon, the usual form of inquiry in the Visitation Articles of Bishops and Archdeacons (*e.g.*, Archbishop Bancroft in 1605, Bishop Babington, of Worcester, in 1607, and Bishop Andrewes in 1619), was, whether the churchwardens always supplied for the Holy Communion, "fine white bread."

The same form of inquiry continued to be generally used after the Rubric had been altered, upon the Revision of 1662, so as to express its purpose to be, "to take away all occasion of *dissension*," as well as of "superstition" (which alone had been previously mentioned). The same motive had been expressed in the Rubric of King Edward's First Prayer Book, "for avoiding all matters and occasion of dissension" ("superstition" not being then added); when the opposite course was taken, of requiring unleavened bread, of a certain form and fashion, to be everywhere and always used. The practice of using fine wheat bread such as is usual to be eaten, and not cake or wafer, appears to have been universal throughout the Church of England from the alteration of the Rubric in 1662, till 1840, or later.

Their Lordships think that if it had been averred and proved that the wafer, properly so called, had been used by the Appellant, it would have been illegal, but as the averment and proof is insufficient, they will advise an alteration of the Decree in this respect.

There remains to be considered the charge as to the Crucifix. As to this the allegation is, that the Appellant unlawfully set up and placed upon the top of the screen separating the chancel from the body or nave of the church a crucifix and twenty-four metal candlesticks, with candles which were lighted on either side of the Crucifix.

This charge was accompanied by two other charges, in respect of which the Appellant has been admonished to abstain from the acts complained of, and to this part of the monition he has submitted. One of these charges was for having formed and accompanied a procession from the chancel, down the north aisle and up the nave back to the chancel again, on the occasion of public service, those taking part in the procession at one time falling upon their knees, and remaining kneeling for some time. The other charge was the setting up, attached to the walls of the church, representations of figures, in coloured relief of plastic material, purporting to represent scenes of our Lord's Passion, and forming what are commonly called stations of the Cross and Passion, such as are often used in Roman Catholic Churches.

* Ibid., p. 94.

† Appendix to 2nd Report of Rit. Comm., p. 430.

The learned Judge, whose decision is under Appeal, thus describes the Screen and Crucifix:—"There is a screen of open ironwork some 9 feet high stretching across the church at the entrance to the chancel; the middle portion of this screen rises to a peak, and is surmounted by a crucifix or figure of our Saviour on the Cross in full relief and about 18 inches long—this is the crucifix complained of. The screen of course, from its position, directly faces the congregation, and the sculptured or moulded figure of our Lord is turned towards them. There is, further, a row of candles at distances of nearly a foot apart all along the top of the screen, which is continued up the central and rising portion of it, the last candles coming close up to the crucifix on either side, so that when the candles are lighted for the evening service, I should presume that the crucifix would stand in a full light."

For the erection of this screen at the entrance of the chancel, in the form in which it is now found there, and surmounted by the crucifix in question, their Lordships think it clear that no faculty has been obtained. There is, indeed, a faculty, dated the 23rd of August, 1870, authorizing the building of "a dwarf wall with screen thereon of light ironwork between the chancel and the nave;" and this faculty appears to have been granted with reference to a ground plan annexed to the petition for the faculty; which ground plan specifies the place where this screen of light ironwork was to be erected. But no further information was given to the Ordinary of the character of the structure, much less of the crucifix by which it was to be surmounted.

Technically, therefore, it must be held that, in the absence of a proper faculty, the crucifix was unlawfully set up and retained. If, however, their Lordships were of opinion that the case was one in which, under all the circumstances, the Ordinary, on the application for a faculty, ought to grant, or might properly grant, a faculty, they might probably have thought it right, before pronouncing any Judgment, to have given an opportunity to the Appellant to apply for a faculty.

Their Lordships, however, are of opinion that, under the circumstances of this case, the Ordinary ought not to grant a faculty for the crucifix.

The learned Judge refers to two cases, decided by this Tribunal, which have a material bearing upon the present question.

The first of these was the case of *Liddell* v. *Westerton*.* In this case, as the learned Judge states, the Court had to pronounce upon the legality of a Cross set up in the Appellant's church. And it was decided that, although before the Reformation the symbol of the Cross had no doubt been put to superstitious uses, "yet that Crosses, when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may still lawfully be erected as architectural decorations," and that the wooden cross erected in that particular case "was to be considered a mere architectural ornament."

The Court determined nothing directly as to the legality of a crucifix, but was at great pains throughout the Judgment to point out that crosses were to be distinguished from crucifixes, saying that "there was a wide difference between the Cross and images of saints, and even, though in a less degree, between a Cross and a crucifix," the former of which, they said, had been "used as a symbol of Christianity two or three centuries before either crucifixes or images were introduced."

The other case is that of *Philpotts* v. *Boyd*.† As to this case the learned

* Moore's Special Report. † 6 L. R., Pr. C. Ap. 435.

Judge states that this Tribunal, in justifying the erection of the Exeter reredos, adhered entirely and very distinctly to the position taken up in the previous case, and pronounced that erection lawful, though it included many sculptured images, on the express ground "that it had been set up for the *purpose of decoration only*," declaring that it was "not in danger of being abused," and that "it was not suggested that any superstitious reverence has been, or is likely to be, paid to any of the figures upon it."

The learned Judge then proceeds to consider whether it would be right to conclude that the crucifix in the present case was set up for the purposes of decoration only; whether it is in danger of being abused, and whether it could be suggested that superstitious reverence had been, or was likely to be, paid to it.

The learned Judge states that the crucifix, as formerly set up in our churches, had a special history of its own.

He refers to the Rood ordinarily found before the Reformation in the parish churches of this country, which was, in fact, a crucifix with images at the base, erected on a structure called the rood loft, traversing the church at the entrance to the chancel, and occupying a position not otherwise than analogous to that which the iron screen does in the present case.

He refers to the evidence as to the preservation of the crucifixes or roods during the reign of Queen Mary, and of their destruction, as monuments of idolatry and superstition, in the reign of Elizabeth.

He takes notice of a letter of Bishop Sandys in 1561 in the "Zurich Letters," first series, p. 73, in which he states:—

"We had not long since a controversy respecting images. The Queen's Majesty considered it not contrary to the Word of God, nay, rather for the advantage of the Church, that the image of Christ crucified, together with Mary and John, should be placed, as heretofore, in some conspicuous part of the church, where they might more readily be seen by the people. Some of us thought far otherwise, and more especially as all images of every kind were at our last visitation not only taken down, but also burnt, and that, too, by public authority, and because the *ignorant and superstitious multitude are in the habit of paying adoration to this idol above all others.*"

The learned Judge arrives at the conclusion that the crucifix so placed formed an ordinary feature in the parish churches before the Reformation, and that it cannot be doubted that it did so, not as a mere architectural ornament, but as an object of reverence and adoration.

He further points out that the worship of it was enjoined in the Sarum Missal, in which the order of service for Palm Sunday ends with the adoration of the Rood by the celebrant and choir before passing into the chancel. And to this reference might be added one to the order for the Communion according to the Hereford use, in which there is a prayer with this introduction: "Postea sacerdos adorans crucifixum dicat."

Proceeding then on these considerations, and dealing with a Church in which was found not merely an illuminated crucifix, but also those stations of the cross and other acts in the conduct of the services, the illegality of which the Appellant does not challenge in his Appeal, the Judge continues thus:—

"It is no doubt easy to say, what proof is there of danger of idolatry now? What facts are there to point to a probability of 'abuse'?

"But when the Court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England

before the Reformation. in a particular part of the Church and for the particular purpose of 'adoration'—when the Court finds that the same object, both in the Church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church *as an architectural ornament only*, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in 'decoration' may end in 'idolatry.'

"If this apprehension is a just and reasonable one, then there exists that likelihood and danger of 'superstitious reverence' which the Privy Council in *Philpotts* v. *Boyd* pronounced to be fatal to the lawfulness of all images and figures set up in a church."

In these observations of the learned Judge their Lordships concur; and they select them as the grounds of his decision which commend themselves to their judgment. They are prepared, under the circumstances of this case, to affirm the decision directing the removal of the crucifix, while at the same time they desire to say that they think it important to maintain, as to representations of sacred persons and objects in a church, the liberty established in *Philpotts* v. *Boyd*, subject to the power and duty of the Ordinary so to exercise his judicial discretion in granting or refusing faculties, as to guard against things likely to be abused for the purposes of superstition.

On the whole, therefore, their Lordships will humbly recommend Her Majesty to affirm the Decree of the Court of Arches except as regards the position of the minister and the use of wafer-bread or wafers; and as to these excepted matters they will humbly advise Her Majesty that inasmuch as it is not established to their satisfaction that the Appellant, while saying the Prayer of Consecration, so stood that the people could not see him break the bread or take the cup into his hand, as alleged in the representation; and, inasmuch as it is not alleged or proved that what was used by him in the administration of the Holy Communion was other than bread such as is usual to be eaten, the decree of the Court of Arches should in these respects be reversed. And they will further humbly advise Her Majesty that in respect of the charges as to which the Decree is reversed, the costs in the Court of Arches should be paid by the Respondents to the Appellant; and further that there should be no costs of this Appeal.

Judgment of the Lords of the Judicial Committee of the Privy Council on Motion in the Appeal of Ridsdale v. *Clifton and others from the Arches Court of Canterbury; delivered Tuesday, 14th March*, 1876.

Present: The Lord Chancellor [Cairns], Lord Hatherley, Sir Robert J. Phillimore, Sir Barnes Peacock, Sir Montague E. Smith.

In the case in which their Lordships have now to express their opinion an appeal has been instituted against the decision of Lord Penzance, as Judge of the Arches Court, dated 3rd of February 1876, and the matters complained of, with regard to that decision, are these: First, that it pronounces unlawful the wearing of certain vestments; Secondly, that it pronounces as unlawful the use in the Holy Communion of wafer-bread or wafers; Thirdly, that it pronounces unlawful the standing by the minister while saying the Prayer of Consecration in the Communion Service at the middle of the west side of the Communion Table, in such wise that during the whole time of the

saying of the Prayer he was between the people and the Communion Table, with his back to the people, so that people could not see him break the bread or take the cup into his hand; and, Fourthly, that it pronounces as unlawful the setting up and placing on the top of the screen separating the chancel of the church from the body of the church, and still retaining thereon, a crucifix. The decree which is thus complained of and appealed against in its form admonishes the present Appellant, the Reverend Charles Joseph Ridsdale, to abstain for the future from the practices and acts set forth in the decree, and from sanctioning and permitting the same; and it also further goes on to direct, affirmatively, the Reverend Charles Joseph Ridsdale to remove or cause to be removed from the top of the screen the figure on the cross fixed thereon.

Now that decree having been made, and notice of appeal having been given, an application was made, as is usual in such cases, for the process which is called inhibition, and citation and monition for process—monition for documents; and against the issuing of that process a caveat has been lodged, which has made it necessary for the Rev. Mr. Ridsdale, the Appellant, to come before their Lordships, and to ask that the process which he seeks should issue. If the process issues in the triplicate form to which I have referred, of inhibition, citation, and monition, the inhibition will restrain the execution of the decree, to which I have referred, pending the appeal; and therefore, in substance, the motion now before their Lordships raises the question whether proceedings in this case under the decree should or should not be stayed pending the appeal.

Now it has been contended, on behalf of Mr. Ridsdale, here, in the very able argument which we have heard, that the issuing of an inhibition, in cases like the present, has always been a matter of course, and is still a matter of course, notwithstanding the provisions of the Public Worship Regulation Act of 1874, and that therefore the caveat against the issuing of the inhibition ought to be removed, and the inhibition ought to issue as a matter of course, as part of the process. That makes it necessary for their Lordships to consider what the nature and character of the part of the process termed the inhibition, upon the occasion of an appeal, was before the passing of the Act of Parliament to which I have referred. There is no doubt that in every appeal in ecclesiastical cases it was very much a matter of course to issue an inhibition. It was, in fact, so much a matter of course that it was permitted to the officer of the court to issue the inhibition as part of the process, whenever it was applied for. But their Lordships cannot arrive at the conclusion that because in every case where there was, or appeared to be, a probable cause for litigation, evidenced by the appeal being brought, the issue of this process was so common as to be left as a ministerial act to the officer of the court; they cannot from this arrive at the conclusion that the discretion of the court as to issuing an inhibition was taken away, or that this tribunal or the supreme tribunal for the time being in ecclesiastical cases, where a case was brought pointedly before its notice, would not have it in its power to exercise its discretion as to whether an inhibition staying proceedings should or should not issue. If their Lordships look to authority upon the subject they cannot but think that the expressions of Sir John Nichols, in the case of *Herbert* v. *Herbert*, show very clearly that in his opinion in a proper case the discretion rested with the tribunal to issue, or not to issue, an inhibition; and the authorities which are referred to in the argnment, in that case of *Herbert* v. *Herbert*, go very strongly to the same point, especially the passage cited from Ayliffe's

Parergon, which is printed at length in a note to the case of *Herbert* v. *Herbert*.

Moreover, upon the reason of the thing, their Lordships also are of opinion that a court which has the right to entertain an appeal must of necessity have this discretion with regard to the issuing of a process, such as inhibition. The inhibition is only a collateral and incidental part of the process. The main process is that of citation, calling upon the party in possession of the decree to appear before this tribunal, and to defend the decree which he has obtained. It would be a strange thing indeed if that which is ancillary and incidental to the main jurisdiction of the appellate tribunal could not be moulded, issued, or refused to be issued, as the tribunal should think best under the circumstances of the particular case. I have only to add to this, with regard to the position of matters before the passing of the Public Worship Regulation Act, the circumstance that certain Rules were issued by this Board in pursuance of the statute 6th and 7th of the Queen, chap. 28, and that it is necessary to refer to an argument which has been urged with regard to these Rules, that they in some way have made the issuing of an inhibition in this case absolutely necessary. Now the Rules which are material upon this point are the 4th and 5th. The 4th is in this form: "When the Registrar has ascertained that the petition of appeal has been referred to the Judicial Committee, he may, on the application of the solicitor, issue the usual inhibition and citation and monition for process." He may do this, on the application of the solicitor, issue the triplicate form of process, inhibition, and citation, and monition for process; but if their Lordships are right in considering, as they do consider, that the issue or non-issue of the inhibition was a matter of discretion, of course this reference in the Rules to the usual inhibition, citation, and monition for process must mean triplicate process when it was to be in triplicate; and where, if ever, the Court should hold that the inhibition should not issue, then the process confined and limited to the citation and monition for process. The 5th Rule is to this effect: "If within one month from the date of the petition of appeal being referred to the Judicial Committee the solicitor for an appellant shall not take out the inhibition and citation and monition for process, the appeal shall stand dismissed." Upon that it was argued that, unless the threefold process were to issue, Mr. Ridsdale would be deprived of his appeal, and it would be absolutely dismissed in consequence of this Order. Their Lordships cannot adopt that construction of the Rule. In their opinion, if it is in their discretion, as they think it is, to say, on a proper case being presented to them, whether the inhibition shall or shall not issue, the Order that it shall not issue will render the taking out the other two parts of the process, the citation and monition for process, sufficient to save the appeal under this Order. In point of fact, the description of the triplicate process is description only, and does not raise the necessity, as an absolute necessity, that the process should be in that triplicate form.

Now, that being the state of the law, as their Lordships understand it, before the Act for the Regulation of Public Worship passed, their Lordships have to consider the effect of that statute. Their Lordships approach the consideration of the statute, bearing in mind, therefore, that before it passed the issue of an inhibition, although so common as to be almost matter of course, was still matter of discretion, if the discretion of this Board were called upon to be exercised upon it. The statute of 1874 provides, by the 9th section, what shall be the form of proceedings before the Judge under

the Act, or the Judge of the Court of Arches, as the case may be, and it provides that the Judge shall pronounce judgment on the matter of the representation, and shall deliver to the parties on application, and to the Bishop, a copy of the special case, if any, and judgment. It provides further that the Judge shall issue such monition, if any, and make such order as to costs as the judgment shall require. It provides then, further, that upon any judgment of the Judge, or monition issued in accordance therewith, an appeal shall lie in the form prescribed by Rules and Orders to Her Majesty in Council; and then comes this final sentence in the clause, "The Judge may, on application, in any case suspend the execution of such monition, pending an appeal, if he shall think fit." We find, therefore, in this Act of Parliament, that which certainly did not exist as a power in the Ecclesiastical Judge before the Act passed. Before this Act passed there was no power whatever in the Ecclesiastical Judge to suspend proceedings under his decree pending an appeal. There was, as has been pointed out at the bar, a power somewhat, perhaps, arbitrary in the Judge to keep possession of his decree in the office of the court until an opportunity were given for the dissatisfied party to present a petition of appeal to Her Majesty in Council, and to obtain an inhibition, which, if obtained, would prevent the execution of the decree. But power in the Judge himself to restrain proceedings under the decree during the whole of the appeal did not exist. That was given for the first time by this statute.

Now their Lordships cannot look at this provision in the statute as otherwise than an indication that in the opinion of the Legislature it ought to be considered in each particular case whether the decree made in that case should be executed pending an appeal, or should be stayed pending an appeal. The intimation of the Legislature is distinct, that that is a matter which ought to be entertained as a question of discretion, and brought, at all events in the first instance, for the decision of the Judge himself who has made the decree. That has been done in the present case, and the decision of the Judge in the present case is, for reasons which he has stated, that the execution of no part of his decree should be suspended pending the appeal. Their Lordships are not sitting upon appeal from that order of the learned Judge, because no appeal from that order appears to be given by the Act of Parliament; but they are sitting here considering the application which is now made to them, that in their discretion the inhibition in the present case should not issue restraining the execution of this decree, either in whole or in part, and they are unable to treat the Act of Parliament as doing otherwise than introducing a new element for them to consider in exercising their discretion as to whether the inhibition ought to issue.

Now, therefore, applying those principles to the case which their Lordships have to decide in their opinion, the mode in which they have to look at a case like the present is this: to consider the balance of convenience or inconvenience with regard to the execution of the decree; that is to say, looking at the facts of the particular case, looking at what is ordered by the Court to be done, whether upon the whole it would be better that the decree of the Judge should be allowed to take its course, or whether the things which it orders to be done are in their nature such as that the doing of them would produce so much injury that it would be more desirable that the decree should be stayed until the decision of the final tribunal is known. That is a practice which is well known in other Courts. It is well known, for example, in the Court of Chancery, where, upon an application to stay the

execution of a decree, it has always been considered to be the question for the Court whether the balance of convenience was more in favour of restraining the execution of the decree in the particular case, or more in favour of letting the decree take its course.

Now in the present case, their Lordships do not desire to express, and it would not be proper for them to express, any opinion whatever as to the merits of the appeal, which ultimately will have to be heard from this decree. They give credit for the present purpose to the decree as the decree of the learned Judge by whom it has been made. On the other hand, they give credit to the sincerity of those who have considered that there is ground for impeaching that decree, and who wish to have their case against the decree heard at the proper time. But, on the other hand, treating the decree as at present, until reversed, the order of the Court, and on the other hand, treating the appeal as evidence that in the opinion, at all events, of the Appellant, there is *probabilis causa litigandi*, they have to look at what are the things which the decree orders to be done or to be left undone. Now in that respect they find a very marked difference between different parts of the decree. With regard to the vestments pronounced unlawful, and which therefore are directed not to be worn; with regard to the use of the wafer-bread, which is also pronounced to be unlawful, and which is therefore directed not to be used; with regard to the posture of standing during the Prayer of Consecration at the west side of the Communion Table, which is also pronounced unlawful, and where therefore the minister is directed not to stand at that time; with regard to all these things, their Lordships consider that no inconvenience and no injury which would be irremediable will arise from the decree being obeyed in those matters pending the appeal.

The other point is different. I refer to the part of the decree which pronounces unlawful the setting up and placing on the top of the screen separating the chancel of the church and retaining there a crucifix; and as to this the decree directs the Rev. Charles Joseph Ridsdale to remove or cause to be removed this crucifix from the screen. Their Lordships do not desire to make any difference between this and the other parts of the decree as to what may be termed the merits; that is to say, they do not, by what they are going to order, wish to place that part of the decree in any different position from the other parts of the decree as regards the correctness of the decree itself. They give credit on that part of the decree as they do to the other parts of the decree, to that which is for the present the decision of the Court below, but they see that different consequences may arise, as to this part of the decree, from executing it pending the decree. It is unnecessary to go into what those consequences are, beyond saying that it is, obviously from the nature of the case, at least possible that a subject which ought to be treated with the greatest reverence might be accompanied with feelings of a different kind if the decree were in this respect in the first instance to be executed, and afterwards upon a reversal of that decree the process had to be repeated of making another change.

For those reasons, and for those only, their Lordships desire to make a difference between this last part of the decree and the parts which precede it. And as to this latter part of the decree, they desire that by the inhibition the execution of that part of the decree should be suspended pending the appeal. The inhibition, therefore, will go limited in the manner which has been indicated to the last part of the decree, but not so as to restrain the execution of any of the other parts of the decree. With regard to costs, their Lordships do not think it fit to give any costs of this appeal to either side.

Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Marsters v. *Durst, from the Court of Arches; delivered* 11*th July*, 1876.

Present:—Lord Chancellor [Cairns], Lord Hatherley, Lord Penzance, Sir Barnes Peacock, Sir Montague Smith.

This is a criminal suit promoted in the Court of Arches against the Appellant, who is one of the churchwardens of the parish of St. Margaret, in the borough of King's Lynn, for having removed from the church, without a faculty, a certain moveable cross of wood which had been placed on a ledge called a "re-table," at the back of and above the Communion Table.

The Respondent is the vicar of the parish, and the cross was placed there by his authority, but without the sanction of a faculty.

In the Court below exception was taken to certain passages in the responsive allegation filed by the Appellant, and they were ordered to be struck out.

The present Appeal is in form an Appeal from that Order, but on the case being opened it appeared to the parties that, as the facts were not really in dispute, it would save both expense and delay if they agreed to a statement of fact in the form of a Special Case, and took the decision of the Court of Appeal upon the merits of the case.

Their Lordships consented to that course being pursued, and the case has been fully argued upon the Special Case so stated.

The question which their Lordships are thus called upon to decide is the single one of the legality of a cross of this description in the place which it occupied when the Appellant removed it from the church.

The Special Case states that the cross is above 3 feet in height; that it is a moveable one; that it was placed by the Respondent's orders on a structure of wood called a "re-table," consisting of a wooden ledge at the back of the Communion Table, having a front of wood about 8 inches deep, coming down to within five-sixteenths of an inch of the surface of the Communion Table, and that this structure is fixed to the wall by nails.

A photograph is appended to the Special Case, from which, and the statements in this case, it is plain that the Communion Table and the "re-table" would at a very short distance bear the appearance of one entire table or structure.

It is further stated that the cross was placed on this ledge with "the intention that it should remain there permanently."

On the part of the Respondent it was contended that the cross was a moveable one, and constituted part of the church furniture; that it was not one of the "ornamental instruments" used in the church services; and that it fell within the category of things "inert," which were mere architectural decorations.

On the part of the Appellant it was contended, amongst other things, that the case fell within the principle of the well-known decision in the cases of Liddell *v.* Westerton, and Liddell *v.* Beal; and as their Lordships are of that opinion, it will not be necessary to go again into the subject at large, or do more on the present occasion than point out what it was that those cases really decided, and give reasons for the conclusion that the present case cannot in principle be distinguished from them.

The two cases in question concerned the Church of St. Paul and the Chapel of St. Barnabas. In both instances there had been placed on the Communion Table a cross, and in both instances these crosses were held to be illegal. It is important therefore to consider what the character of these crosses was, and on what grounds they were ordered to be removed. In the Chapel-of-ease of St. Barnabas the things complained of were first a rood-screen and a cross thereon, which cross was held to be lawful; and secondly, "a stone table or altar with a metal cross attached thereto," and this cross was held to be unlawful.

The cross complained of in the Church of St. Paul was attached to the Communion Table, and is thus described in the Judgment at page 2 :—

"Their Lordships understand that this Table, described as an Altar or Communion Table, is made of wood, and is not attached to the platform but merely stands upon it; that it is placed at the east end of the church or the chancel, according to the ordinary usage as to Communion Tables; that at the end nearest the wall there is a narrow ledge raised above the rest of the Table; that upon this ledge which is termed 'super-altare,' stand the two gilded candlesticks, which are moveable, and between them the wooden cross which is let into and fixed in the super-altare so as to form part of what is thus described as the Altar or Communion Table."

It will be observed that this description closely tallies with the description as given in the special case of the Communion Table in the present case. There is here, as there, a moveable table, and a ledge of wood raised above the table at the back of it, and on this ledge two candlesticks, and a cross between them. The differences are that in St. Paul's Church the ledge of wood was called a "super-altare," while in this case it is called a "re-table"; in St. Paul's Church the ledge stood upon the table, while in this case it is fixed to the wall and does not quite touch the table, being separated by about a quarter of an inch from it; and finally, that in St. Paul's Church the cross was "let into and fixed" in the ledge, while in the present case it was not fixed but placed on the ledge "with the intention that it should remain there permanently."

It is upon these differences of structure that the Respondent relies, and he points particular attention to a passage in the Judgment relating to the cross in St. Paul's Church, which is as follows :—

"Next with respect to the wooden cross attached to the Communion Table at St. Paul's. Their Lordships have already declared their opinion that the Communion Table intended by the Canon was a table in the ordinary sense of the word, flat and moveable, capable of being covered with a cloth, at which or around which the communicants might be placed in order to partake of the Lord's Supper; and the question is whether the existence of a cross attached to the table is consistent either with the spirit or with the letter of those regulations. Their Lordships are clearly of opinion that it is not; and they must recommend that upon this point also the decree complained of should be affirmed."

It is argued by the Respondent that their Lordships must have intended to have condemned only crosses which were "fixed" to a ledge standing on the Communion Table or to the Communion Table itself, and that the two circumstances in the present case, of the ledge being a quarter of an inch above the Table, and the cross not fixed in the ledge but moveable, are sufficient to take it out of the principle of that Judgment.

Their Lordships are unable to accept or approve so narrow and limited a view of the conclusion arrived at in those important cases.

It is hardly to be conceived that a distinction should have been intended to be drawn between a cross "attached" to the Table (or the ledge above the Table) and a cross occupying a "permanent" position upon it; and still less that the lawfulness or unlawfulness of the cross should be declared to reside in such a distinction.

Upon such a view of the law, further refinements would be inevitable; for, on the one hand, a cross might be "let into and fixed" in the "re-table" in such a manner as to be easily removed if and when desired, and therefore practically moveable; and, on the other hand, it might be ponderous, not easily moved, and intended to remain permanently in its place, and yet not actually "fixed" in the sense of being fastened to the ledge or table on which it stands.

To hold that such refined differences as these constitute the distinction between what is lawful and what forbidden by the law would be to give every importance to matters which are trivial and incidental, to the exclusion of those which are substantial and of serious import.

To any stranger entering the church, the present structure is not perceptibly different from that which was presented to the eye in the Church of St. Paul. The flat table, the narrow ledge rising above it, the candlestick at either end of this ledge, and the cross in the middle, constitute the apparent structure in both cases. It would be only by a minute inspection, instituted close at hand, that any difference would be revealed between them. For those who attend the services in this church, therefore, these differences do not practically exist, and whatever objection attended the Communion Table with its cross in the case of St. Paul's Church is equally present here.

When the Judgment in the above cases is carefully considered, it is very apparent what that objection was; and why the crosses on the Altar or the Communion Table in both cases were declared unlawful.

Speaking of the Altar in St. Barnabas, their Lordships said "the question was whether the structure was a Communion table within the meaning of the law," and with respect to St. Paul's "whether the existence of a cross attached to the table is consistent either with the letter or the spirit" of the regulations made by law.

To answer these questions their Lordships inquired at length into the character and appearance of the Roman Catholic altar as it existed before the Reformation—the doctrines respecting the Holy Communion which that altar was designed to subserve, and to which it was intended to conform—the change in these doctrines which was effected by the Reformation, and the consequent substitution of the plain flat moveable table of wood for the fixed altar with its super-altare, its crucifix, and candlesticks at either end.

It was upon a careful review of these facts and considerations, and not upon any refined distinction as to the mode in which the cross was connected with the table, that their Lordships, construing the legal regulations bearing on the subject, came to the conclusion that a Communion Table such as that in the Church of St. Paul, was not warranted by those regulations; and their decision, therefore, applies to and governs the present case, in which the structure complained of is, their Lordships think, in no substantial or essential feature distinguishable from it.

Some additional light is thrown on the meaning and intention of the Judg-

ment above discussed by the subsequent proceedings in one of the cases (Liddell *v.* Beal) to which that judgment gave rise.

It was thought by Mr. Beal that the monition of the Court for the removal of the cross in the Chapel of St. Barnabas had not been complied with by removing the cross from the Altar and placing it on the sill of the great eastern window of the church, immediately above the Communion Table, though at a distance of five feet from it, and he instituted proceedings complaining of this as an evasion.

Their Lordships thought differently, and expressed themselves as follows:—

"Now there was formerly a cross which stood upon the stone table, and was in a sense at least affixed to it, which was objected to, and, as it appears, properly objected to. The stone table has been altogether removed, and with it the cross, but the cross has been placed in another part of the church, not in any sense upon the table which has been substituted for the stone table, nor in any sense in communication, or contact, or connection with it. It remains in the church as an ornament of the church . . . . and does not conflict with the order contained in this monition."*

* The following is the Judgment above referred to: it was delivered June 14, 1861. Present: The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

The Lord Justice Knight Bruce:

The question before their Lordships is, whether the Minister or incumbent, and the Church wardens or Chapel wardens of the Church or Chapel of *Saint Barnabas*, in the Diocese of *London*, have complied with a Monition issued in the course of last year, in consequence of a decision of the Privy Council in a former year, by which they were directed "to remove the structure of stone used as a Communion table in the said Church or Chapel, together with the cross on or near to the same, and to provide instead thereof a flat moveable table of wood: to remove any cover used at the time of the ministration of the sacrament of the Lord's Supper, worked or embroidered with lace, or otherwise ornamented, and to provide and substitute a fair white linen cloth without lace or embroidery or other ornament to cover the Communion table at the time of the ministration of the Lord's Supper; and to cause the Ten Commandments to be set up on or against the east-end of the said Church or Chapel in compliance with the Canon in that case made and provided, within thirty days after they shall have been served herewith."

It has been alleged by Mr. *Beal* (not now a resident in the Parish or Chapelry; but formerly so, and at one time, at least, a party to these proceedings) in a very temperate argument (such as he promised at the outset), and a very sensible one, that these requisitions have not been complied with; at least, that some of them have not; because, as to some of the requisitions, there is not any complaint or question.

The first is the direction "to remove the structure of stone used as a Communion table in the said Church or Chapel." That has been done; there can be no doubt that that has been obeyed. But the Monition goes on, "together with the cross on or near the same."

Now, there was formerly a cross which stood upon the stone table, and was, in a sense at least, affixed to it; which was objected to, and, as it appears, properly objected to. The stone table has been altogether removed, and with it the cross; but the cross has been placed in another part of the Church or Chapel, not in any sense upon the table which has been substituted for the stone table, nor in any sense in communication, or contact, or connection with it. It remains in the Church as an ornament of the Church, and their Lordships think (if the word may respectfully be applied to such a subject) not an unusual or improper ornament; in no sense remaining there so as to disobey or conflict with the order contained in this Monition.

Their Lordships, therefore, think that that part of the Monition which directs the structure of stone to be removed, together with the cross on or near the same, has been obeyed.

It then directs that there shall be provided "instead thereof a flat moveable table

It will here be observed that no stress is laid on the fact that the cross was no longer alleged to be "fixed," which, if the Respondent's view of the principal decision were correct, would at once have determined the question; but the retention of the cross in its new position is justified upon the ground that it was not "in any sense upon the table, nor in any sense in communication or contact or connection with it."

It is plain, therefore, that, in the decision of the principal case, it was not to the cross itself that any objection was made, nor to the particular means or fastenings by which it was retained in its place, but to its connection with the Communion Table; and if, instead of removing the cross to a place several feet above the table, and quite unconnected with it, Mr. Liddell had simply

of wood." That has been done. It is stated, however, with truth, that upon this table there is placed, and in general stands, a moveable ledge of wood for the purpose of holding candlesticks and vessels; at least, that is the purpose for which it is used. It is, as I have said, not fixed to the table. If remaining there when the cloth is to be placed upon the table for the purpose of the administration of the Lord's Supper, as it would interfere with that, it is accordingly removed, and the cloth is placed upon the table, and then the ledge replaced.

It is not shown, and their Lordships think it ought not to be inferred, that there is anything superstitious (if the term may be used) or anything improper in the addition of that ledge. But, even if there were, their Lordships are not satisfied that it is within the terms of this Monition, or that the Monition in any sense or respect extends to it.

But, in whatever way that matter be taken, their Lordships think that neither disobedience nor offence is established with regard to that moveable ledge.

They are then directed "to remove any cover used at the time of the ministration of the sacrament of the Lord's Supper, worked or embroidered with lace or otherwise ornamented, and to provide and substitute a fair white linen cloth, without lace or embroidery, or other ornament, to cover the Communion table at the time of the ministration of the Lord's Supper."

That has been done, because, as has already beeen said, though the ledge would interfere with the covering of the table completely if the ledge remained, the removing of the ledge for the purpose prevents any such difficulty or objection.

They are then further directed to "cause the Ten Commandments to be set up on or against the east-end of the said Church or Chapel, in compliance with the Canon in that case made and provided."

The whole of that part of the sentence must, of course, be taken together; and when we refer to the Canon upon the subject (which is the 82nd Canon mentioned during the argument), we find it is thus expressed: "That the Ten Commandments be set up upon the east-end of every Church and Chapel, where the people may best see and read the same."

Now, it appears upon the evidence, and their Lordships are satisfied that, if this were literally complied with in the manner contended for, from the nature of the screen and the opening in the screen, which has not been directed to be removed, the people assembled could not see or read the Ten Commandments so set up; and their Lordships are of opinion, from the evidence before them, that the Ten Commandments are set up as nearly according to the Canon as the nature of the structure will permit; and they think, therefore, that neither disobedience, nor irregularity, nor evasion, has been established with respect to that circumstance; and, as to the letters in which the Ten Commandments are written, a *fac simile* of the writing having been laid before us, their Lordships are of opinion that there is no substantial difficulty in the way of reading the letters which have been used; the letters (which are now not uncommon) can very easily be deciphered and understood by any one capable of reading the ordinary writing or printing which in ordinary cases is used.

Their Lordships are of opinion, therefore, that no disobedience, no impropriety, no irregularity, has been established; and that the present application, therefore, fails. But the application has been conducted temperately and properly, and their Lordships do not think it necessary to give any direction as to costs.

made the cross a moveable one, and fixed a re-table to the wall (such is in the present case) for it to stand upon, it is inconsistent with the language just quoted to suppose that their Lordships would have held the monition to have been complied with.

Their Lordships are therefore of opinion that the cross in the position which it occupied while in the church is forbidden by law; and they will advise Her Majesty that the present suit should be dismissed; but, as both parties have been in the wrong in acting without a Faculty, without costs.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Jenkins v. *Cook, from the Arches Court of Canterbury; delivered 16th February*, 1876.

Present:—Archbishop of Canterbury [Tait]; Lord Chancellor [Cairns]; Archbishop of York [Thomson]; Lord Hatherley; Lord Penzance; Lord Chief Baron [Kelly]; Lord Justice James; Sir Barnes Peacock; Sir James Hannen.

In this case the Appellant, a parishioner in the parish of Christ Church, Clifton, instituted proceedings under the Clergy Discipline Act, in the Court of the Bishop of Gloucester and Bristol, against the Respondent, the vicar of the parish, for an offence against the laws ecclesiastical in refusing to administer to the Appellant the Sacrament of the Holy Communion.

The case was sent by letters of request to the Court of Arches, and on the 16th July, 1875, a sentence was pronounced by the Dean of Arches, dismissing the suit against the Respondent and condemning the Appellant in costs.

From this sentence the Appellant appeals to Her Majesty.

There are no facts in dispute in the case, and the allegations as to the refusal complained of, and as to the grounds of the refusal, are extremely simple.

The Appellant alleges that on the 28th September, 1874, he gave notice in writing to the Respondent of his intention to present himself to receive the Holy Communion at the mid-day service on the following Sunday, the 4th of October, 1874, and that having presented himself accordingly, he was, without lawful cause, repelled, and the Respondent refused to administer the Sacrament to him.

To this allegation the Respondent answers that he on the day in question did refuse to deliver to the Appellant, or to permit the Appellant to receive the elements, of the Holy Communion when he presented himself to receive the same, for, and on account of the writing and publishing by the Appellant of certain letters, particularly referred to, and for and on account of his causing to be printed and published a certain volume of selections from the Old and New Testaments, and for no other cause or reason whatsoever.

These allegations therefore raise the issue, and the only issue, between the parties. In order, however, to appreciate properly the justification relied upon by the Respondent, it is necessary to refer more particularly to the letters and volume referred to in the defensive allegation, and to the circumstances under which those letters were written.

The Appellant states, and it is not controverted, that he has been a resident parishioner of Christ Church for six years past; that he is a member of the Church of England, and has during that time regularly attended Divine service at the parish church, and has also during that period been in the habit

of receiving the Holy Communion in the church monthly; that during his attendance at Divine service he has always conducted himself reverently, joining in the responses in accordance with the directions of the rubric; that he believes in the inspiration of the canonical books of the Old and New Testaments, that Scripture contains all things necessary for salvation, and in the doctrine of the atonement for the sins of mankind by the death of our Lord and Saviour Jesus Christ on the Cross; and he exhibits a Book of Family Prayers compiled entirely from the Liturgy of the Church of England which he has published, and which is regularly used by him at family prayers in his own house.

It appears that the Appellant in the year 1865 had also printed and published a volume entitled "Selections from the Old and New Testaments." This volume has been produced before their Lordships. It consist of extracts or selections from the Bible, apparently arranged for the convenience of reading at family prayers. Many chapters and portions of chapters are omitted, but the volume is a bulky one, although not containing any note, comment, or matter other than the text of the Bible so far as it is given.

It appears, further, that on the 6th July, 1874, in reference to a sermon preached by the Respondent in the parish church, the Appellant wrote to the Respondent a letter as follows:—

"My dear Sir,—

"As one of your parishioners, who accepts his conscience as the voice of God within him, I beg to protest most emphatically against the irreligious tendency of your sermon of last night. I quite believe that you would not willingly deceive others, but it is my opinion that no difficulties as to language or books should stifle what is imprinted in every man's breast by his Maker—that is to say, the knowledge of right and wrong.

"I am,

"My dear Sir,

"Yours very sincerely,

"Henry Jenkins."

What was the subject or substance of this sermon, or what were the expressions used therein, their Lorships have no means whatever of knowing, and no evidence has been adduced on either side as to it.

It appears that, about two years before this time, the volume of selections had been sent by the Appellant to the Respondent, but the Respondent had laid the volume aside, and apparently had not looked at or examined it.

After, however, receiving the letter of the 6th July, 1874, the Respondent for the first time examined the volume of selections, and, as he states, shortly afterwards called on the Appellant at his residence, in order to communicate with him in reference to the volume. But the Appellant, as the Respondent alleges, refused to have any communication with him in reference thereto.

At this part of the case the evidence of Mrs. Jenkins may properly be referred to. She states that, on the 20th July she called on the Respondent, and told him she did so, hoping to do away with any unpleasant impression in his mind arising from the Appellant's abrupt manner when the Respondent had called at the Appellant's house. She then asked him if he meant to carry out the threat conveyed in his last remark to the Appellant on that day. The Respondent said he did mean to carry it out most emphatically "Then he went on; he commenced about the volume of selections that had

been sent him two years ago. He said, at the time he received them he thought they were meant for family worship, which I said they were. He had not looked at them, he had put them by on a shelf, or something to that effect, but since his visit to the Appellant he had examined the volume thoroughly from beginning to end, and he found all passages relating to the devil and evil spirits were excluded from the selection." Further on Mrs. Jenkins continues: "I attempted to draw his attention to the Appellant's character and manner of life from his youth up, the honesty of all his motives, and his blamelessness in every condition of life as husband and father, and he said that only made the case more difficult to manage. Then he said let Mr. Jenkins, as he cannot sit down and talk like a man, write me a letter, a calm letter, and say he believes in the devil, and I will give him the Sacrament."

On the same day, and apparently in consequence of this suggestion of the Respondent that the Appellant should write him a letter, the Appellant wrote to him these words:—

"My dear Sir,

"Mrs. Jenkins has very kindly called upon you in order to arrange matters, with, I am afraid, very poor success. With regard to my book—'Selections from the Old and New Testaments,'—the parts I have omitted, and which has enabled me to use the book morning and evening in my family, are, in their present generally received sense, quite incompatible with religion or decency (in my opinion). How such ideas have become connected with a book containing everything that is necessary for a man to know I really cannot say, and can only sincerely regret it.

"I am,

"My dear Sir,

"Yours very sincerely,

"Henry Jenkins."

To this the Respondent replied, by a letter of the 24th July, 1874, as follows:—

"Dear Sir,

"It would be a great relief to me if I could find in your letter of 20th instant, or in any other communication written or spoken, something to show that I have misunderstood your opinions, or that you have changed them for the better. Unhappily the conclusion I cannot but form from your letters, words, and printed 'Selections from the Old and New Testaments,' is, that of set purpose you reject very many portions of Holy Scripture. That you have, for instance, cut out as you have from the Bible what is therein written concerning Satan and evil spirits, is to me terrible evidence of how far you have allowed yourself to go in mutilating the Word of God. Large differences of opinion concerning Scriptural matters no prudent or charitable minister of the Gospel would condemn, but there are perversions and denials which no faithful minister will sanction, lest he allow unbelief a recognized place in the Church of Christ. With such perversions and denials, I grieve to say, I am driven to connect yourself; while they remain not retracted or disavowed you cannot be received at the Lord's Table in my church. I hope you will feel that my course is directed according to conscience and not by resentment. I quite forgive your behaviour when I called, and although

you would then listen to nothing, if you will converse quietly with me my time shall be willingly given for that purpose. May the Spirit of Truth deliver you from the errors you have adopted, and in the hope of seeing this my prayer answered,

"I remain,
"Dear Sir,
"Yours faithfully,
"FLAVEL COOK."

In answer to this the Appellant wrote another letter, which is the last that need be referred to, dated the 25th of July, 1874:—

"My dear Sir,
"Thinking as you do, I do not see what other course you could consistently have taken. I shall, nevertheless, come to the Lord's Table as usual at 'your' church, which is also mine.
"I am,
"My dear Sir,
"Yours very sincerely,
"HENRY JENKINS."

These, then, are the letters written by the Appellant, and this is the character of the volume the writing and publishing of which are stated by the Respondent to have constituted the only cause for which he refused to permit the Appellant to partake of the Holy Communion. The question is, do they constitute a sufficient cause?

The *primâ facie* right of a parishioner to partake of the Holy Communion might probably be maintained irrespective of any specific statutory enactment; but as the right is distinctly declared by the Statute 1 of Edward VI, chap. 1, sect. 8, their Lordships may conveniently refer to the words of that enactment as it is set out in page 530 of the first volume of the revised Statutes:—

"And allso that the preist which shall ministre the same shall at the least one day before exhorte all psons which shalbe present likewise to resorte and prepare themselfs to receive the same, and when the daie prefixed come the after a godly exhortacon by the minister made, wherin shalbe further expressed the benefitt and comforte promised to them which worthelie receive the saide hollie Sacrament, and daunger and indignacon of God threatened to them w^ch^ shall presume to receive the same unworthelie, to thende that everie man maye trye and examyn his owne conscience before he shall receive the same, the saide minister shall not withowt lawfull cawse denye the same to any parsone that wool devoutlie and humblie desire it, anny lawe statute ordenance or custome contrarie therunto in any wise notwithstanding."

In the argument before their Lordships, it has not been contended that, for the purpose of this case at all events, the "lawful cause" mentioned in the Statute, was to be sought for elsewhere than in the rubric of the Book of Common Prayer prefixed to the Communion Service, or in the Canons of 1603, and their Lordships therefore find it unnecessary to consider whether there could be any further or other "lawful cause" within the meaning of the Statute. Neither is it necessary for their Lordships to decide, and they do not decide, that the Canons, which do not, as such, bind the laity, could, of their own authority, prescribe "causes" which would be sufficient

or "lawful" within the meaning of the Statute. In this particular case the "lawful" causes relied upon are that the Appellant must be taken, under the circumstances, to have been "an open and notorious evil-liver" within the meaning of the rubric, and to have been "a common and notorious depraver of the Book of Common Prayer," within the meaning of the 27th Canon. Their Lordships will assume that the last named cause, that mentioned in the Canon, would be, if made out, as valid and lawful a cause as that of being "an open and notorious evil-liver," within the meaning of the rubric.

The learned Judge, from whose sentence the present Appeal is brought, has expressed his opinion upon this point in the following words: "I am of opinion that the avowed and persistent denial of the existence and personality of the devil did, according to the law of the Church, as expressed in her Canons and Rubrics, constitute the promoter 'an evil-liver,' and 'a depraver of the Book of Common Prayer and administration of the Sacraments,' in such sense as to warrant the Defendant in refusing to administer the Holy Communion to him, until he disavowed or withdrew his avowal of this heretical opinion; and that the same consideration applies to the absolute denial by the promoter of the doctrine of the eternity of punishment, and, of course, still more to the denial of all punishment for sin in a future state, which is the legitimate consequence of his deliberate exclusion of the passages of Scripture referring to such punishment."

Their Lordships must, in the first place, observe that the learned Judge appears to have considered that, in the Rubric to which reference is here made, the words defining a cause for repulsion are "an evil-liver," and, in the Canon, "a depraver of the Book of Common Prayer." This, however, is not the case. The Rubric after stating that "So many as intend to be partakers of the Holy Communion shall signify their names to the curate at least some time the day before;" proceeds as follows:

"And, if any of those be an *open and notorious* evil-liver, or have done any wrong to his neighbours by word or deed, *so that the congregation be thereby offended*, the Curate, having knowledge thereof, shall call him and advertize him not to come to the Lord's Table until he hath openly declared himself to have truly repented and amended his former naughty life, *that the congregation may thereby be satisfied, which before were offended;* and that he hath recompensed the parties to whom he hath done wrong, or, at least, declare himself to be in full purpose to do so as soon as he conveniently may."

The words again of the 27th Canon, which is the Canon relied on, are these:—"No minister, when he celebrateth the Communion, shall wittingly administer the same to any but to such as kneel, under pain of suspension; nor, under the like pain, to any that refuse to be present at Public Prayers according to the orders of the Church of England; nor to any that are *common and notorious* depravers of the Book of Common Prayer and Administration of the Sacraments, and of the Orders, Rites, and Ceremonies therein prescribed, or of anything that is contained in any of the Articles agreed upon in the Convocation, one thousand five hundred and sixty-two, or of anything contained in the book of ordering the Priests and Bishops; or to any that have spoken against and depraved His Majesty's Sovereign authority in causes Ecclesiastical; except every such person shall first acknowledge to the Minister, before the Churchwardens, his repentance for the same and promise by word (if he cannot write), that he will do so no more, and except (if he can write) he shall first do the same under his hand-writing to be delivered

to the Minister, and by him sent to the Bishop of the Diocese, or Ordinary of the place. Provided, that every Minister so repelling any, as is specified either in this or the next precedent Constitution, shall, upon complaint, or being required by the Ordinary, signify the cause thereof unto him, and therein obey his order and direction."

The "cause," therefore, which under the Rubric is sufficient to warrant a minister of his own authority, and without any trial, in repelling a parishioner from the Holy Communion is that he is "an *open and notorious* evil-liver," who thereby gives offence to the congregation, and, under the Canon, that he is "a *common and notorious* depraver of the Book of Common Prayer."

Their Lordships therefore will proceed to consider whether the Appellant is brought under either of these descriptions. And in the first place their Lordships must observe that if they had here to examine whether the Appellant has in point of fact either entertained or expressed the opinions attributed to him by the learned Judge, or if they were called upon to decide that those opinions or any of them could be entertained or expressed by a member of the Church, whether layman or clergyman, consistently with the law and with his remaining in communion with the Church, they would have looked upon this case with much greater anxiety than they now feel in its decision. They desire to state in the most emphatic manner both that there is not before them any evidence that the Appellant entertains the doctrines attributed to him by the Dean of Arches, and that they do not mean to decide that those doctrines are otherwise than inconsistent with the formularies of the Church of England. This is not the subject for their Lordships' present consideration. What, and what alone, they have to inquire is whether the Appellant can be properly held to be "an open and notorious evil-liver" within the meaning of the Rubric, or whether in the words of the Canon he was "a common and notorious depraver of the Book of Common Prayer."

As to the first of these inquiries there is absolutely no evidence whatever that the Appellant was an evil-liver, much less an open and notorious evil-liver. The term "evil-liver," according to the natural use of the words, is limited to moral conduct, and the distinction between conduct and belief is clearly recognized in the Canons, especially in the contrast between the 109th and 110th. Against the moral character of the Appellant there is no evidence, and no imputation; and it appears from statements which are uncontroverted to have been irreproachable. Their Lordships therefore put aside this justification of the Respondent as wholly inapplicable to the case, and they can only express their regret that through an inaccuracy in the use of words an imputation so misplaced and so irksome in its nature should have been made.

Is, then, the Appellant a common and notorious depraver of the Book of Common Prayer? The only specific reference to the Book of Common Prayer which is traced to the Appellant is the statement that the Book of Family Prayer already mentioned was compiled by him entirely from the Book of Common Prayer, and that in a letter from him to the Bishop, dated in September, 1874, he writes that he values the Book of Common Prayer "only second to the Bible itself."

The mode, however, in which it is said that the Appellant was a depraver of the Book of Common Prayer, is this. It is assumed that all parts of the Holy Bible not printed in the "Selections" are omitted because they are rejected on the ground of the doctrine which they teach, and it is said that

some parts so omitted are found in the Book of Common Prayer, or that doctrines in the Common Prayer are supported by some of these omitted passages. And it is contended that omission is rejection, and rejection depravation.

In none of these propositions, nor in their logical connection, can their Lordships concur. Omission is not rejection. If it were, the Lectionary in the Prayer Book would be open to this grave charge. Nor is rejection, however censurable or heretical, necessarily depravation. The terms "deprave or depraver," in their more ancient signification, are now little used; but their meaning in the 16th century may be well collected from the Statute of Edward the Sixth, already referred to, where we find these expressions applied to the Sacrament of the Holy Communion:

"Whatever person shall deprave, dispise, or comtempne the saide moste blessed Sacrament by any contemptuose wordes, or by anny wordes of depravinge, dispisinge, or reviling shall suffer imprisonment, &c."

But was the Appellant, "*a common and notorious* depraver of the Book of Common Prayer?"

Now it was admitted in the Court below, and in the argument before their Lordships, that the publishing and circulation of the book termed "Selections" could not possibly amount of itself to a depravation of the Book of Common Prayer, and could not indeed be construed to be an offence of any kind. But it was contended that these selections, coupled with the expressions in the letter of the 20th July, 1874, amounted to the offence in question.

That letter must be construed with reference to the interview between the Respondent and Mrs. Jenkins, which took place on the same day, and out of which interview the writing of the letter arose. It is obvious that the words, "the parts I have omitted," cannot refer to all the portions of the Bible not printed in the Selections; but must be limited to those parts which were more particularly referred to by the Respondent at the interview. Construing the letter in connection with what passed at the interview, the expressions in it, which are not very distinct or intelligible, do not go farther than this, that the construction which the Appellant placed upon certain parts of the Bible not being the same as the construction which, in his opinion, was generally placed upon those parts, he omitted them from his family reading. What his own construction is, or what he supposes to be the generally received construction, is not stated, and it would not be allowable, even if it were necessary, to arrive at either construction by surmise or suspicion.

But it does not appear to their Lordships to be necessary to criticise more minutely the expressions in this letter, for the important question still remains, whatever be the construction of the letter, can the Appellant in consequence of it be said to have been "a common and notorious depraver of the Book of Common Prayer?" Now the letter was not written by the Appellant spontaneously. A message was sent to him through Mrs. Jenkins inviting him to write a letter to the Respondent. It was proposed that the letter should be, and the letter was sent as, a friendly and private, as it was also a solicited, communication. It appears to their Lordships that even were there anything in the letter which could amount to a depravation of the Book of Common Prayer, which they do not suggest or think there is, still it would be impossible to hold that the writing of such a letter, under the circumstances which they have mentioned, could make the Appellant "a common and notorious depraver."

These observations would dispose of the case, were it not that their Lord-

ships think that they should notice an argument much pressed at the Bar, but to which their Lordships can attach no weight, namely, that by reason of the intervention, or possible intervention, of the Bishop of the Diocese, another remedy was, or might have been, open to the Appellant, and that he ought not to have taken proceedings under the Clergy Discipline Act. This argument in fact divided itself into two parts. It was said, in the first place, that the Respondent had duly reported to the Bishop the grounds on which he had repelled the Appellant from the Holy Communion, and that he was then entitled to wait until he received some order from the Bishop on the subject, and that no such order was given. The other form of the argument was that the Appellant had, under the Rubric and Canons, a right of appeal to the Bishop personally, and that he either had not so appealed, or, if his communications with the Bishop amounted to an appeal, the Bishop had expressed his opinion against the Appellant, and in favour of the Respondent.

As to the first part of this argument, their Lordships are clearly of opinion that the repelling by the Respondent of the Appellant must be judged of at the time when it took place, and could not be affected by anything afterwards occurring between the Respondent and the Bishop. At the time it took place it was either justifiable or unjustifiable. If justifiable, the Respondent is, of course, entitled to succeed; but, if unjustifiable, the Appellant must be immediately entitled to a remedy, and their Lordships can discover nothing which shifts the responsibility from the Respondent and places it upon the Bishop.

Their Lordships also think that the remedy to which the Appellant is entitled is that which in this case he has sought for. He complains that the Respondent has committed an offence against the laws ecclesiastical by wrongfully refusing him admission to the Holy Communion, and he has followed the process prescribed by the Clergy Discipline Act. Their Lordships do not find in the Rubric prefixed to the Communion Office any indication of an appeal to the Bishop by a parishioner repelled from the Communion. They find that an intimation is to be given to the Bishop by the Minister, but this is apparently for a purpose entirely different, namely, that the Bishop may proceed against the person repelled to punish him *pro salute animæ*. With regard to an Appeal under the Canon, their Lordships do not understand how an Appeal given by a Canon, even if it were given, could take away a higher right to maintain proceedings for a violation of a right protected by Statute. But their Lordships do not understand that the Canon referred to in this case, the 27th, professes to give the repelled person any right of appeal; and even if it did, the Bishop in the present case appears throughout to have expressed the opinion that he ought not himself to decide the question between the Appellant and the Respondent, but that it should be decided in proceedings such as have been taken.

On the whole, their Lordships are of opinion that they must advise Her Majesty to reverse the sentence of the Dean of Arches, and in remitting the cause to admonish the Respondent, the Reverend Flavel Smith Cook, for having, on the 4th of October, 1874, without lawful cause, refused to deliver to the Appellant, or permit the Appellant to receive, the elements of the Holy Communion, and, further, to monish him to refrain from committing the like offence in future.

Their Lordships have no doubt that the Respondent has acted throughout in good faith, and in the conscientious belief that he was discharging a duty

imposed upon him, and they have also not failed to observe that this controversy appears to have been preceded by an uncalled for, and, as they think, uncourteous letter, written by the Appellant to the Respondent, his Minister, protesting against and condemning a sermon preached by him. Their Lordships cannot however hold that there is in these circumstances sufficient to warrant them in departing from the general rule according to which the Respondent must pay the costs in the Court below and on Appeal.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Philpotts v. *Boyd and others, from the Court of Arches; delivered 25th February*, 1875.

Present: Lord Hatherley, Lord Penzance, Lord Selborne, Lord Chief Baron [Kelly], Sir Montague Smith, Sir Robert P. Collier.

This is an Appeal from a Decree of the Court of Arches, reversing an Order made by the Lord Bishop of Exeter, as Visitor of the Cathedral Church of St. Peter in Exeter, for the removal of a sculptured reredos recently erected at the east end of the choir of that Cathedral by the Dean and Chapter, on the ground that the sculpture, so erected, contains or consists of images, not permitted within churches by the law of the Church of England.

The Judgment of the Court below makes it necessary, in the first place, to decide whether the Bishop, as Ordinary, had a visitatorial power over the Cathedral Church of Exeter, with reference to the sculpture of which the Appellant complained, and whether, in the exercise of that power, it was competent for him, if he found that sculpture to have been unlawfully erected, to make an order for its removal.

The Respondents have contended throughout these proceedings that the Bishop had no such power, and the learned Judge of the Court of Arches has so determined.

It is not, and indeed it could not be, disputed that, according to the General Ecclesiastical Law, "all Deans and Chapters are subject to the visitation of the Bishop, *jure ordinario*, and of the Archbishop of the province, *jure metropolitico*." (2 Burn's Eccl. Law, Phillimore's Ed. 1842, p. 93.) It is equally certain that as to some matters, at all events, the Bishop, visiting his Dean and Chapter as Ordinary, would have power to make orders binding upon the Dean and Chapter, subject to an appeal to the higher Ecclesiastical Tribunals. By the case of Dr. Goodman, reported in Dyer, p. 273 (the same law is recognized by Lord Holt in *Phillips* v. *Bury*, 2 T.R., 353), it appears that, before the Church Discipline Act, 3 & 4 Vict., cap. 86, this power would have enabled a Bishop, as visitor, to pronounce, in case of necessity, a sentence of deprivation against an offending member of the Chapter. Since that Statute it has been determined, in the Dean of York's case (2 Q.B., 1), that, in order to inflict any personal punishment for an ecclesiastical offence upon an individual member of a Chapter, the Bishop must proceed against him as against any other Clerk in holy orders, under the Church Discipline Act, and not as visitor. But the Statute leaves untouched all other power which the Bishop might previously have exercised in his visitation except this single power of proceeding against individuals by way of punishment.

Two arguments have been urged before their Lordships in this case against the Bishop's jurisdiction.

The first is that, although the Bishop may have power to visit the Dean and Chapter as Ordinary, and also power, in some cases, to make orders binding on the Dean and Chapter (subject to appeal), yet he cannot do so with reference to any part of the structure or fabric of the Cathedral Church. For such a limitation of the Bishop's visitatorial power no authority has been cited: and, considering the nature and importance of the duties which the Dean and Chapter have to perform with respect to the fabric of their Church, the burden of proof rests, in their Lordship's opinion, on those who, admitting the general visitatorial power, contend that it is thus limited. It appears, not only from the precedents in the history of the Cathedral Church of Exeter, to which their Lordships will have occasion to refer, but from the form of the Articles of Inquiry at the visitation of the Cathedral Church of York by Archbishop Harcourt, *jure ordinario*, in 1841 (which the learned editor of Burn's Ecclesiastical Law, edition 1842, vol. 2, p. 93, c., states to have been "framed in careful compliance with former precedents"), that the practice, in visitations of this kind, has been for the Ordinary to include among the matters cognizable by him in this form of proceeding, the repairs, and generally the state and condition of the fabric, of the Cathedral Church. The reason of the thing, and all the authority which has been produced, is opposed to this first argument, which their Lordships, therefore, reject as untenable.

The other argument (and it is that which seems to have chiefly prevailed with the learned Dean of the Arches), is, that the Dean of Exeter has a peculiar jurisdiction, exclusive of the Bishop, within the "close" of the Cathedral Church, which (it is contended) includes the area and fabric of the Cathedral itself. Reliance, for this purpose, was placed upon an instrument "Composition," dated in 1616, and purporting to be made between the then Bishop of Exeter, the Dean and Chapter, the Dean, the several Archdeacons of the Diocese, and the Custos and College of Vicars Choral of the Cathedral Church. Their Lordships were referred to what purports to be a copy of this document, printed in a note at pp. 232—236, of the 3rd vol., of Dr. Phillimore's Reports. It is hardly necessary to say that such a printed statement in a book of Reports could not be treated by their Lordships as in itself evidence either of the existence or the due execution of such a document. The fact of its execution seems to have been challenged in the reported case. Their Lordships, however, understood the argument in the Court below, and upon appeal, as having proceeded upon the footing of the execution and authority of such a document, and they therefore proceed to consider its value and effect. It was not alleged that the successors of the then Bishop of Exeter could, by the mere force of an agreement or composition of this nature, made in 1616, be ousted from any ordinary jurisdiction which they would otherwise have possessed; but the contention was, that this document is evidence of the previous legal existence of a peculiar of the Dean within the "Close" of Exeter, exclusive of the ordinary jurisdiction of the Bishop. Some of the remarks made by Sir John Nicholl, in his judgment in *Parham* v. *Templar* (3 Phill., 252), seem for this purpose to be important. This document, he says, "states that the agreement or composition is made upon a view of ancient usage, and upon searching and consulting proper authorities. But it does not state how how far any such search was made, nor recite any particulars to prove ancient usage. In short, whether it may not be altogether irregular and an usurpation, the instrument itself does not afford any means of ascertaining.

The search was probably made, not by the Archdeacons or the Bishop, or any of the Principals, but by their agents or officers,—possibly some practitioners in these Courts not very well read either in the canon or the civil law of the country." Upon these grounds, and on the further ground of the Metropolitan not being a party to the instrument, the learned Judge, in that case, refused to accept it as evidence that an Appeal from those Peculiars of the Dean and Chapter (such as Ashburton), which were exclusive of the Bishop's ordinary jurisdiction, would lie to the Bishop in the first instance, and not to the Metropolitan. Yet this seems to have been an inseparable part of the composition, considered as (what it purports to be) a general scheme for defining the manner and form in which the execution of the ecclesiastical jurisdiction of the several parties to it should for the future "be bounded, limited, and for ever thereafter used and exercised by the said parties and their successors;" and for the "clearing" of those "questions" which it recites to have been "then, and theretofore, moved between the same parties, touching the execution of ecclesiastical jurisdiction within the Diocese of Exeter;" "and for the settling and establishing a peace and certainty therein for ever thereafter between the said parties and their successors." The Court does not appear to have proceeded in the case of *Parham* v. *Templar* upon the sole evidence of this document, so far as it recognized Ashburton as being a Peculiar of the Dean and Chapter, in which their jurisdiction was exclusive of the ordinary jurisdiction of the Bishop; and, in that case, no question whatever arose as to any jurisdiction either of the Dean or of the Bishop within the Cathedral Close or the Cathedral itself.

Supposing, however, that this composition could properly be accepted as evidence of some exclusive peculiar jurisdiction of the Dean within the Cathedral Close, its terms must be accurately weighed to ascertain the true nature and character of that jurisdiction. The material parts of the composition are these:—

1. "That Matthew Sutcliff, Dean of the said Cathedral Church, and his successors, and his and their officer and officers, shall for ever hereafter, solely and without any concurrence, prove in common form all testaments" (except those of knights, beneficed men, and such as were *de robâ Episcopi*) "within the parish of Braunton, in the county of Devon, and the Close of the Cathedral Church of St. Peter, in Exeter; and also, solely and without any concurrence, hear and determine, within the said parish of Braunton and Close aforesaid, all causes, as well *ad instantiam partis*, as *ex-officio*."

2. That "within the residue of the Diocese, the Bishop or his Chancellor, solely and without concurrence, shall have power to dispense in all causes, to grant all manner of licences, sequestrations, and relaxations, and (generally) to do whatsoever is not formally declared to belong to the said Archdeacons, Dean and Chapter, Dean, and Custos and College, or to some of them, as aforesaid."

3. "Lastly, that the said Bishop, his Chancellor, or officers for the time being, shall and may, for ever hereafter, once in every three years complete, visit all the said Diocese, except the peculiars of the said Dean and Chapter, Dean, and Custos and College of Vicars, and their successors."

Unless, therefore, the visitatorial authority of the Bishop, as Ordinary, over the Dean and Chapter themselves, was, according to the true construction of this instrument, to be exercised by the Dean, as part of his peculiar jurisdiction within the Close of the Cathedral Church, it is not taken away from, but is (by the very terms of this instrument) reserved to the Bishop.

"Peculiars," as Ayliffe states (in a passage cited by Sir John Nicholl, at p. 245 of the Judgment in *Parham* v. *Templar*), "are called exempt jurisdictions; not because they are under no Ordinary, but because they are not under the Ordinary of the Diocese, but have one of their own." The Ordinary of the Cathedral Close of Exeter, so far as it is described as a peculiar by this composition, was the Dean. But the only matters in respect of which the Dean was, according to the terms of the composition, to exercise ordinary jurisdiction within the Close, were the grants of probates, not of all persons, but of persons not falling within certain specified classes, and "the hearing and determination of causes," whether *ad instantiam partis*, or *ex-officio*. The composition does not provide that the Dean shall visit himself; still less does it provide that the Cathedral Church shall be exempt from all ordinary visitation, and subject only to the metropolitan jurisdiction of the Archbishop. It is further manifest, that if, by the terms of this composition, the Bishop, as Ordinary, had been excluded from visiting the Dean and Chapter or the Cathedral, it would have been a total, and not merely a partial, exclusion. Any visitation of the Cathedral by the Bishop, as Ordinary, for any purpose whatever, would (in that view) have been quite as much *ultra vires*, as a visitation for the purpose of setting right whatever might be found wrong as to the fabric of the Church.

Passing from the letter of the composition itself to the evidence which is before us of the usage and practice, as to visitation, of the Cathedral Church of Exeter since the date of that instrument, their Lordships find that this evidence is altogether adverse to the contention of the Respondents. There is no instance given of the exercise of any jurisdiction by the Dean, except one case of brawling within the Cathedral, which arose in the year 1827, and which was manifestly a "cause," either *ad instantiam partis*, or *ex-officio*. Such a cause would no doubt have been cognizable by the Dean under the express terms of the composition if the Cathedral ought to be deemed part of the Close, and it would have been equally cognizable, under the same instrument, by any Archdeacon of the Diocese, if the brawling had happened within one of that Archdeacon's peculiars. But there is no trace of its ever having been supposed or contended, before the arguments in the present case, that the Bishop of Exeter had not, over the Dean and Chapter, and within the Cathedral of the Diocese, as large and full visitatorial jurisdiction, as Ordinary, as any other Diocesan Bishop has in his cathedral church. That jurisdiction has been, in practice, exercised on more than one occasion, without objection or protest, and its existence was expressly admitted, in the course of a recent public inquiry, by the Dean and Chapter.

In 1660 Bishop Seth Ward held a primary visitation of this Cathedral; and in the Articles then exhibited by him, inquiries were made (among other things) into the condition of the fabric generally, and of the roof, windows, seats, floors, towers, and bells. No question appears to have been raised as to his authority so to inquire.

In 1678 Bishop Lamplugh held another primary visitation of the Cathedral. Articles were exhibited on that occasion substantially similar to those of Bishop Ward (though not in exactly the same form); and, in addition to these, the second Article inquired "whether any passages or doors had been made in the times of the late rebellion, leading into the Cathedral by breaking down the wall thereof, and continued to be so?" The Dean and Chapter put in their answers to these Articles. As to the second Article they said "that there was only one door, towards the north-east, that was

made in the late times, which had not been walled up (as another door then made had been), because it was a great convenience to several dignitaries of the Church and other persons of quality, and was neither indecent itself nor prejudicial to anybody." It appears, however, that by some objector, connected (as is to be presumed) with the Cathedral, a presentment was made against the door, which the Dean and Chapter thus desired to keep open, as having been improperly and illegally made through a private chapel at the north-east end of the Church, "to the dishonour of the Church," and to the prejudice of a particular family which had right of burial there. The Bishop, as visitor, adopted this latter view; and he thereupon ordered "that the said door be forthwith shut up, and hereafter not opened; and that, before Candlemas next ensuing, the aforesaid door be taken away, and the wall made up, and the passage restored to the right owner; and that the great gate next the street be by that time taken down and walled up." At a further visitation on the 21st April, 1680, it was finally certified to the visitor by the Dean that this order had been fully obeyed, and that the door in question had been walled up, as directed."

In 1852, the Dean and Chapter of Exeter, in answer to questions addressed to them by the Royal Commissioners for inquiring into the Cathedral Churches and Capitular Bodies in England, stated that the Bishop of Exeter was their visitor; and that the powers of the visitor were "those vested in him by the general law, not modified by any special custom." For the Dean, they did not then claim any peculiar jurisdiction, further than by stating that he had "archidiaconal authority within the Close;" which, however, was no longer exercised by him. In Bishop Voysey's Statute of 1544 (to which they then referred, as the document in which the duties of the several dignitaries and officers would be found most fully stated), the same statement is found, that the Dean had "jurisdictionem Archidiaconalem in omnibus enumeratis infra clausum Exoniensis Ecclesiæ," no other jurisdiction of the Dean being there mentioned.

Their Lordships, are, under these circumstances, unable to agree with the opinion expressed by the learned Dean of Arches against the jurisdiction of the Bishop in the present case.

The right of the Bishop to visit, as Ordinary, in respect of the fabric being established, the question arises whether the order made by him for the removal of the reredos can be sustained. It was first suggested in argument that the Respondents were in the same position as if they were applying for a faculty to authorize its erection inasmuch as the erection without a faculty was illegal.

Their Lordships cannot accede to this argument of the Appellant's Counsel. It was pressed upon them in order to lay the foundation for an exercise of discretion on the part of the Bishop even in a case where there might be no breach of the law.

No authority has been cited, and no instance has been produced, in which a grant of any such faculty has been applied for, either in the case of Exeter Cathedral or of any other Cathedral, although it is notorious that important alterations in the fabric of most Cathedrals have continually been effected.

The argument, which was urged at the bar, that although a faculty may not strictly be necessary, the express or implied consent of the Bishop ought to be obtained for every alteration in the fabric of a Cathedral, was equally unsupported by authority; and their Lordships cannot, under these circumstances, conclude either that the Bishop, as Visitor, has a discretion to order

any alteration in the fabric of the Cathedral Church, except on some definite legal ground; or that such a discretion, if not possessed by the Bishop, could be exercised by the Court of Arches, or by Her Majesty in Council, when adjudicating on an appeal from the Bishop's judgment as Visitor.

The case before us on the present Appeal must therefore be determined with reference to the question whether the structure itself is contrary to the Ecclesiastical Law.

For determining this question their Lordships have proceeded to examine the authorities and documents cited before them in proof of the alleged illegality of the Respondent's proceedings.

At the commencement of the Reformation attention was directed to the numerous representations in churches, either by sculpture or painting, or both, of those who were venerated either as Divine persons or as Saints of the Church, and to the outward acts of worship or honour paid to these representations or images. In the first year of Edward VI (1547) injunctions were issued to the Clergy and Laity by the King, with the advice of the Protector and the Council, purporting to be in continuation of like injunctions issued by Henry VIII, which, amongst other things denounced, as tending to idolatry and superstition, "the offering of money, candles, or tapers to relics or images, or kissing or licking of the same." And the Clergy were directed to take down and destroy "such images as they know to have been so abused with pilgrimages or offerings of anything made thereunto, or shall be hereafter censed unto," and to suffer thenceforth "no torches or candles, tapers nor images of wax to be set before any image or picture, but only two lights upon the High Altar . . . admonishing their parishioners that images serve for no other purpose but to be a remembrance whereby men may be admonished of the holy lives and conversations of those that the said images do represent; which images, if they do abuse for any other intent, they commit idolatry in the same."

By the 28th of these Injunctions the Clergy are ordered "to take away, utterly extinct, and destroy all shrines, tables, candlesticks, trindles, or rolls of wax, pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition, so that there remain no memory of the same in walls, glass windows, or elsewhere within their Churches or houses." The execution of these injunctions was intrusted to the Ordinary, and Articles were framed to be inquired of in the King's visitation, one of which inquired, "Whether there do remain not taken down in your Churches, Chapels, or elsewhere, any misused images with pilgrimages, and whether do remain, not defaced and destroyed, any shrines, coverings of shrines, or any other monument of idolatry, superstition, and hypocrisy."

A question has been raised as to the authority under which these injunctions were issued; whether, under the statute 31 Henry VIII, c. 8, giving to the King's Proclamations the force of law, or by virtue of the Act of Supremacy. The learned Judge in the Court below seems to treat the injunction as a Proclamation under the statute, which statute was soon afterwards repealed; but whether it was so or not appears to their Lordships to be an inquiry not material to the present issue, for the reasons to be afterwards mentioned.

The next document relied upon by the Appellant is a Latin letter headed "Mandatum ad amovendas et delendas imagines" of Archbishop Cranmer to the Bishop of London, dated the 24th February, 154$\frac{7}{8}$, which recites (in English) letters missive (purporting to have been received by the Arch-

bishop), signed by certain Lords of the Council, and containing the following passage:—

"After our right hartye recommendations to your Lordship, where now of late in the king's majestie's visitation amonge other goodlye injunctions commanded to be generally observed throughe all partes of this his hignes realme, one was set forthe, for the taking downe of all such images as had at any tyme been abused with pilgrimages, offerings, or censings; albeit that this said injunction hath in many partes of the realme ben wel and quyetlye obeyed and executed, yet in many other places muche stryfe and contentyon hath rysen and dayly ryseth, and more and more encreaseth, about the execution of the same, some men beyng so supertytyous or rather wylfull, as they wold by theyr good wylles retayne all such images styll, although they have beene mooste manyfestlye abused, and in some places also the images which by the saide injunctions were taken downe, be now restored and set up againe, and almoste in every place ys contentyon for images, whether they have been abused or not; and whiles these men go about on both sides contentyouslye to obtaine theyr mindes, contending whether this or that image hath been offered unto, kyssed, censed, or otherwise abused, partyes have in some places been taken in suche sorte, as further inconvenyence is very like to ensue yf remedie be not provided in tyme; considering therefore that allmost in no places of this realme ys any sure quyetness, but where all images be hoolly taken awaye and pulled downe already, to the intent that all contentyon in everye part of this realme for this matter may be clerely taken awaye, and that the lyvely images of Chyste shulde not contende for the deade images, which be things not necessary and without whiche the churches of Chryst contynued most goodlye many yeres; We have thought good to signify unto you that his highnes pleasure, with th' advyse and consent of us the lord protectour and the reste of the counsell, ys, that immediately upon the sight hereof, with as convenyent diligence as you maye, you shall not onlye give ordre that all the images remayninge in any church or chappell within your diocese be removed and taken away, but also by your letters signifye unto the reste of the bishopes within your province his highnesse pleasure for the lyke order to be given by them and every of them within their several dioceses; and in th' execution thereof we requyre both you and the reste of the bisshopes forcsaid to use suche foresight as the same may be quyetlye donne with as good satisfaction of the people as may be."

The Archbishop then directs the Bishop to proceed accordingly, and Articles appear to have been framed to be inquired of in the visitation of the Diocese of London; one of which is framed in the very words of the 28th of the King's Injunctions, so far as regards images.

Whatever may have been the legal effect of this mandate, it may be assumed that it was sent under the circumstances stated, and in consequence of the letter set forth as having been sent to the Archbishop from the Lords of the Council.

It appears plain to their Lordships that the Injunctions were directed (3rd and 28th) to the removal or destruction of such images only "as had at any time been abused" by superstitious observances; but the letter refers to the difficulty of distinguishing them from others, and to the pretext made for retaining some that had been "manifestly abused" by reason of their alleged exemption from abuse. Accordingly, it is directed that, in order to make sure of attaining the original purpose, all the remaining images should be then removed.

This order, or letter, then of the King's Council, explained as it is in its objects and intentions on the face of the document itself, appears to their Lordships to amount to no more than an administrative act or step taken at the time, for the time, and dictated by the necessities peculiar to the time. It did not contain, nor profess to contain, the enunciation of any general law of a permanent character with respect to images. It, no doubt, proceeded on the implied assertion that the worship or abuse of images was contrary to the true doctrine of the Church, then at the commencement of its Reformation. But it did not involve all images in a general condemnation, even by implication, for it distinguished between those which had been abused and those which had not, so far as condemnation went, and ordered the removal of all, whether abused or not, for the sake of peace, and for the purpose of insuring obedience to the former orders. Far from denouncing dead images as things unlawful, this document speaks of them "as things not necessary."

The Act of the 3rd and 4th Edward VI, intituled "An Act for the abolishing and putting away divers books and images," enacts, by the 1st Section, that all books (enumerating many) heretofore used for service of the church, written or printed in the English or Latin tongues, other than such as are or shall be set forth by the King's Majesty, shall be by authority of this present Act clearly and utterly abolished, extinguished, and forbidden for ever to be used or kept in this realm or elsewhere within any of the King's dominions.

The 2nd Section enacts that, if any person that then had, or thereafter should have, in his custody any such books or images of stone, timber, alabaster, or earth, graven, carved, or painted, which heretofore have been taken out of any church or chapel, or yet stand in any church or chapel, and do not before the last day of June next ensuing deface and destroy, or cause to be defaced and destroyed, the same images and every of them, "and do not deliver up the books there mentioned in the manner and for the purpose of their destruction therein mentioned, he shall, for every book willingly retained in his hands, incur such penalties as in the Act mentioned." The careless wording of the Act, which omits all penalty with reference to images, induces a suspicion that the introduction of images into the Act was an afterthought; but, be this as it may, this Act would imply the necessity of all persons defacing or destroying or delivering up all images which had already been, or might afterwards be, removed out of churches, and probably, also, the obligation of removing those then remaining in churches, whether abused or not, except in cases falling within the exception of the 6th Section of the Act, which provides, that the Act shall not extend "to any image or picture or any tomb in any church or chapel or churchyard only for a monument of any king, prince, or nobleman, or other dead person, which hath not been commonly reputed and taken for a Saint, but that such pictures and images may continue in the like manner and form as if the Act had never been had or made."

The exception itself shows the generality in all other respects of the enactment as embracing all images; though it is remarkable that the excepted cases are referred to as occurring in any church or churchyard, whilst the rest of the Statute appears to be confined to images contained in or removed from the inside of churches or chapels.

This Statute was repealed by 1 Mary, sec. 2, c. 2, but that Statute was in its turn repealed by 1 Jas. I, c. 25, sec. 48, and the Statute of Edward was thereby revived. The Act of James I is itself repealed by the 26 and 27

Vict., c. 125. But an express section of that Act provides that, where any Act thereby repealed had the operation of reviving any former Act, such reviver shall not be affected. The Act of Edward VI, therefore, remains unrepealed.

It is in this state of circumstances that their Lordships deem it unnecessary to consider by what authority the Royal Injunctions and the Archbishop's mandate may have been originally issued.

Their Lordships concur in the opinion expressed by this Tribunal in Westerton *v.* Liddell, and cited by the learned Judge in the Court below, viz., that the Act "related to the destruction of images already ordered to be removed, but which either had not been removed, or, having been so, were still retained for private devotion and worship." It may be regarded as a recognition by the Legislature of the validity of these orders (though not expressly referred to), and of the obligation of obedience to them, but it does not go further! and, as with the mandate above referred to, so with this statute, it appears to their Lordships, that the efficacy of the Act of Edward was spent upon the definite purpose to which it was directed, and that the Legislature did not thereby make, or intend to make, provision in respect of the subsequent use or abuse of any other images.

Up to this time then, viz., up to and including the Statute of Edward the VIth, the case as to "images" stands thus :—The King's injunctions in the first year of his reign condemned several superstitious practices with reference to images, such as pilgrimages to particular images, offerings made to them of any kind, kissing or licking, or censing the same, and directed all shrines, pictures, paintings, and other monuments of feigned miracles, pilgrimages, idolatry, and surperstitions, to be destroyed by the Incumbent, so that there remain "no memory of the same in walls, glass windows, or elsewhere within the churches or houses of their parishioners." The Metropolitan then communicated to the Bishop of London a letter received by him from the Privy Council, with reference apparently to what had been done under the Injunctions, and the difficulty of distinguishing images which had been abused from those which had not, which letter directs a total removal and destruction of all images. This is followed by the Statute, and so matters appear to have rested till the reign of Mary, when the Act of Edward was repealed, and the images, or some of them, were probably restored.

It is remarkable that nothing was done by Elizabeth with reference to the revival of the Act of Edward, but in the first year of her reign (1559) Injunctions were issued by her, the 23rd of which directed that the Clergy should "take away, utterly extinct, and destroy all shrines, . . . pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition, so that there remain no memory of the same in glass walls, windows, or elsewhere within their churches and houses;" and Articles, on the visitation of the Queen, were issued, founded on these Injunctions, the 45th of which inquired whether the Clergy knew any that kept "in their houses any undefaced images, tables, pictures, paintings, or other monuments of feigned and false miracles, . . . and do adore them, and specially such as have been set up in churches, chapels, and oratories."

In the next year the Queen put forth the following Proclamation :—

"Elizabeth.—The Queen's Majesty understanding that by means of sundry people, partly ignorant, partly malicious or covetous, there hath been of late years spoiled and broken certain ancient monuments, some of metal, some of stone, which were erected up as well in churches as in other public places

within this realm, only to show a memory to posterity of the persons there buried, or that had been benefactors to the buildings or dotations of the same churches or public places, and not to nourish any kind of superstition, by which means not only the churches and places remain at this present day spoiled, broken, and ruinated, to the offence of all noble and gentle hearts, and the extinguishing of the honourable and good memory of sundry virtuous and noble persons deceased, but also the true understanding of divers persons in this realm (who have descended of the blood of the same persons deceased) is thereby so darkened, as the true course of their inheritance may be hereafter interrupted, contrary to justice; besides many other offences that hereof do ensue to the slander of such as either gave or had charge in times past, only to deface monuments of idolatry and false feigned images in churches and abbeys; and therefore, although it be very hard to recover things broken and spoiled, yet both to provide that no such barbarous disorder be hereafter used, and to repair as much of the said monuments as conveniently may be Her Majesty chargeth and commandeth all manner of persons hereafter to forbear the breaking or defacing of any parcel of any monument, or tomb, or grave, or other inscription and memory of any person deceased, being in any manner of place: or to break any image of kings, princes, or noble estates of this realm, or of any other that have been in times past erected and set up for the only memory of them to their posterity, in common churches, and not for any religious honour, or to break down and deface any image in glass windows in any church without consent of the Ordinary, upon pain that whosoever shall herein be found to offend, to be committed to the next gaol. . . . ."

The words "false," and "feigned images," which frequently occur in these documents, may either refer to images to which particular efficacy was falsely attributed, or (a meaning borne out by some passages in the Homilies) to images falsely alleged to be true likenesses of either the Saviour or any Saints, of whom no true likeness existed. But whatever meaning be assigned to these words, the language of both the Injunctions and the Proclamation, is plainly addressed, not to all "pictures, paintings, or monuments, &c.," but to a limited class of them, and this a class tainted with falsehood or superstition. As the Reformation proceeded, and the Articles of Religion came to receive statutory authority, the doctrine of the Church on this subject was plainly set forth.

The 22nd Article of Religion declares that "the Romish doctrine concerning Purgatory, pardons, worshipping, and adoration, as well of images as of reliques, and also invocation of saints, is a fond thing vainly invented, and grounded upon no warranty of Scripture, but rather repugnant to the Word of God." In other words, it condemns only the abuse of images.

But great stress has been laid in the argument of this case upon the Homilies against the Perils of Idolatry, which are recognized in the 35th Article of Religion (amongst other Homilies) as containing "a godly and wholesome doctrine, and necessary for these times, and therefore are judged to be read in churches by the ministers diligently and distinctly, that they may be understood of the people."

The 46th and 49th Canons give special directions as to the reading of the Homilies, and the 80th Canon orders the Book of Homilies to be provided in each parish.

This recommendation, however, of the Homilies cannot be pressed further than as containing an approbation of "doctrines," therein contained, and even

that of a qualified character, as being specially necessary for the times when the Articles were framed and published. Now the Homily against the Peril of Idolatry (contained in several parts) sets forth in very glowing colours the vanity and folly of paying adoration or worship to images or paintings, but it recognizes the original intention of such images or paintings to have been the better instructing of the ignorant, as set forth in the letter of Gregory to Serenus (cited by the learned Judge in the Court below). The Homily observes, "you may withal note that seeing there is no ground for worshipping of images in Gregory's writing, but a plain condemnation thereof, that such as do worship images do unjustly allege Gregory for them." The Homily, however, proceeds to affirm that the worshipping of images is a necessary consequence of their being allowed to exist, and therefore concludes strongly for their entire abolition, irrespective of actual abuse. Now it is plain that the "doctrine" maintained by the Homily is that of the 22nd Article, and condemns paying "honour and reverence to images as being an act of idolatry, and contrary to the Second Commandment." In the judgment of its author the existence of any image, whether originally intended for instruction or not, is dangerous, as tending to idolatry. This cannot be called doctrine. It is an opinion as to the consequences which might at that time follow the use of representations of sacred objects, and probably the opinion might then be well founded; whilst it is, on the contrary, notorious that numerous sculptures and pictures representing the Saviour and Apostles and other holy men exist, and have existed for more than two centuries in and outside of our churches, to which no worship has been paid. The old associations were broken off, and the old "monuments of superstition" had either been removed, or become innocuous, before the reign of Elizabeth was closed.

In the 9th of Elizabeth, on a visitation by Archbishop Parker, Articles were exhibited, the 6th of which inquired whether any taught "that any man is borne with which do extol any superstitious religion or religious pilgrimages, lighting of candles, kissing, kneeling, or ducking to images." And at another visitation in the 12th of Elizabeth, by the same Metropolitan, Articles were exhibited, by the 6th of which inquiry is made "whether images and all other monuments of idolatry and superstition be destroyed and abolished, and whether your churches and chancels be well adorned and conveniently kept without waste, destruction, or abuse of anything. Whether the rood loft be pulled down according to the order prescribed, and if the partition between the chancel and the church be kept."

These Articles appear to observe the distinction noticed in the Queen's Proclamation already referred to between the representations which had been abused and those which had not. It is not improbable that there had existed some conspicuous representation of a crucifix in the rood-lofts which had been abused, and therefore was directed to be removed.

In Cardwell's "Annals" (Vol. I, No. LXXVII) are Articles intended to have been exhibited at Archbishop Grindal's visitation in the 18th Elizabeth, the 4th of which inquires "whether rood-lofts be taken down to the cross-beam," and the 6th inquires whether (amongst other things), "all images and other relics and monuments of superstition and idolatry be utterly defaced, broken, and destroyed, and if not, where and in whose custody they remain." It appears to be doubtful whether these Articles were ever exhibited. From this time, and notwithstanding the revival in the time of James I of the Act of 3 and 4 Edward VI, there appears to have been neither

further legislation nor inquiry with reference to pictorial or sculptured representations of sacred subjects in churches.

What, then, is the character of the sculpture on the reredos in the case before their Lordships? For what purpose has it been set up? To what end is it used? and is it in danger of being abused? It is a sculptured work in high relief—in which are three compartments. That in the centre represents the ascension of our Lord, in which the figure of our ascending Lord is separated by a sort of border from the figures of the Apostles, who are gazing upward. The right compartment represents the Transfiguration, and the left the descent of the Holy Ghost on the Day of Pentecost. The representations appear to be similar to those with which every one is familiar in regard to the sacred subjects in question. All the figures are delineated as forming part of the connected representation of the historical subject. The ascension necessarily represents our Lord as separated from the Apostles, who are gazing at Him on His ascent. As finials to the architectural form of the reredos, there is on each side a separate figure of an angel. It is plain to their Lordships that the whole erection has been set up for the purpose of decoration only.

It is not suggested that any superstitious reverence has been or is likely to be paid to any figures forming part of the reredos, and their Lordships are unable to discover anything which distinguishes this representation from the numerous sculptured and painted representations of portions of the sacred history to be found in many of our cathedrals and parish churches; and which have been proved, by long experience, to be capable of remaining there without giving occasion to any idolatrous or superstitious practices. Their Lordships are of opinion that such a decorative work would be lawful in any other part of the church: and, if so, they are not aware of any contravention of the laws ecclesiastical by reason of its erection in the particular place which it now occupies. Their Lordships have not adverted to the case of Cook and others *v.* Tallent, mentioned by the learned Judge in the Court below, because they have been furnished by the Registrar with a full note of that case, which appears to have proceeded on consent.

Their Lordships desire it to be clearly understood that nothing decided in this case affects the question of superstitious regard being paid, contrary to XXIInd Article of Religion, to any representations or images that are, or may at any time be, set up in churches. The law will at all times be sufficiently strong to correct and control any such abuse: but their Lordships are of opinion that the sculpture in question is not liable to be impugned in that respect. Their Lordships will, therefore, recommend Her Majesty to reverse the decree pronounced by the Dean of the Arches, so far as it reversed the decree of the Lord Bishop of Exeter in pronouncing for his jurisdiction as Visitor and Ordinary of the Cathedral Church of St. Peter, in Exeter; but to affirm the decree of the Dean of the Arches in all other respects; and their Lordships, regard being had to the argument in the Court below and before them, in opposition to the jurisdiction of the Lord Bishop do not decree the payment of any costs of this Appeal by any party. Indeed, they understood it to be stated at the Bar, by the Counsel for the Respondents, that they did not ask for costs.

Judgment of the Right Honourable the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheppard v. *Bennett from the Court of Arches: delivered 8th June*, 1872.

Present at the hearing of the Appeal:—Lord Chancellor [Hatherley]; Archbishop of York [Thomson]; Bishop of London [Jackson]; Master of the Rolls [Romilly]; Sir James W. Colvile; Sir Joseph Napier; Lord Justice James; Lord Justice Mellish; Mr. Mountague Bernard; Sir Montague Smith.

This is an Appeal from the final Sentence or Decree pronounced by the Dean of the Arches Court of Canterbury on the 23rd day of July, 1870, and also from two Interlocutory Orders made by the same Judge, in a cause of the office of the Judge promoted by Thomas Byard Sheppard, the Appellant, against the Rev. William James Early Bennett, Vicar of the parish of Frome Selwood, in the Diocese of Bath and Wells, the Respondent, for having offended against the laws ecclesiastical by having, within two years from the date of the institution of the Cause, caused to be printed and published certain works in which he is alleged to have advisedly maintained or affirmed doctrines directly contrary or repugnant to the Articles and Formularies of the United Church of England and Ireland in relation to the Sacrament of the Lord's Supper, such works being entitled respectively "Some Results of the Tractarian Movement of 1833," forming one of the essays contained in a volume entitled "The Church and the World," edited by the Rev. Orby Shipley, Clerk, printed and published in London in the year 1867: "A Plea for Toleration in the Church of England, in a Letter addressed to the Rev. E. B. Pusey, D.D., Regius Professor of Hebrew, and Canon of Christ Church, Oxford, 2nd edition," printed and published in London in the year 1867; and "A Plea for Toleration in the Church of England, in a Letter to the Rev. E. B. Pusey, D.D., Regius Professor of Hebrew, and Canon of Christ Church, Oxford, 3rd edition," printed and published in London in the year 1868.

The Cause was instituted in the Arches Court of Canterbury by virtue of Letters of Request of the late Lord Bishop of Bath and Wells, in accordance with the provisions of the Act 3rd and 4th of the Queen, cap. 86.

The Respondent was duly cited on the 26th of July, 1869; and the Citation, with Affidavit of Service, will be found in the Appendix at page 6.

No appearance was given to the Citation, and in default of appearance Articles were filed in accordance with the practice of the Court.

On the 30th October, 1869, the Judge, having previously heard Counsel on behalf of the Appellant, directed the Articles to be reformed by omitting such parts thereof as charge the Respondent with contravening the 29th Article of Religion, entitled "Of the wicked which eat not the body of Christ in the use of the Lord's Supper."

From such Decree or Order, a Petition of Appeal was presented, with the permission of the Judge, and the Appeal came before the Judicial Committee of the Privy Council on the 26th day of March, 1870, when the Lords of the Committee, having heard Counsel on behalf of the Appellant, agreed to report to Her Majesty their opinion against the Appeal, and that the Decree or Order appealed from ought to be affirmed, and the cause remitted, with all its incidents, to the Judge of the Court from which the same was appealed.

An Order in Council, confirming the Report of the Judicial Committee, was afterwards made.

The cause was accordingly remitted to the Arches Court of Canterbury, and on the 3rd day of June, 1870, in default of appearance on the part of the Respondent, the Judge of the Court, having heard Counsel on behalf of the Appellant, himself reformed the Articles, and admitted the same as so reformed, notwithstanding that the Counsel for the Promoter objected to the reformation of the Articles so made by the Judge as being at variance with, and exceeding the reformation directed by, the Order of the 30th October, 1869.

On the 16th day of June, 1870, the Cause came on for hearing, and an application was then made by Counsel that the passages in the 5th, 6th, 7th, and 32nd Articles, which had been struck out by the Judge in his reformation of the Articles, on the 3rd day of June, might be reinstated. The Judge, however, made no further Order thereon, and the hearing of the Cause was continued.

On the 23rd day of July, 1870, the Judge, by his Interlocutory Decree, having the force and effect of a definitive sentence in writing, pronounced that the Proctor for the Appellant had failed in sufficiently proving the Articles, and dismissed the Respondent from the suit.

The present Appeal is from so much of the Interlocutory Decree or Order of the 3rd day of June, 1870, as in effect directs the passages in the 5th, 6th, 7th, and 32nd Articles to be struck out; also from the Interlocutory Decree or Order of the 16th day of June, 1870, whereby, in effect, the Judge declined to allow such passages to be reinstated, and from the final Sentence or Decree of the 23rd day of July, 1870.

The Respondent has not appeared upon the hearing of the Appeal, and the Court has not had that assistance from the argument of Counsel in his behalf which is especially desirable in cases like the present, where the Committee are called upon to advise Her Majesty on matters of grave importance as a Tribunal of Ultimate Appeal.

The Counsel for the Appellant first opened the Appeal from the Interlocutory Order of the Judge of the 3rd day of June, 1870, whereby he adhered to the reformation that he had made in the 5th, 6th, 7th, and 32nd Articles of Charge.

With regard to the reformation of the Articles, the course originally taken seems to be sanctioned by usage; but it appears to their Lordships to be a course attended with considerable inconvenience, and one which might lead to great delay, if not to a miscarriage.

The original Order of the Arches Court directed the Articles of Charge to be reformed, by omitting all such parts thereof as charged the Respondent with contravening the 29th Article of Religion, and this Order was affirmed on Appeal, on the recommendation of this Committee.

The form of the Order leaves open to further determination by the Court what parts of the Articles of Charge, do, in effect, charge the Respondent with contravening the 29th Article of Religion, and thus opens the door to further discussion and (as in this case) to a further Appeal. In the mean time the Judge himself strikes out such parts of the Articles of Charge as he conceives to be within the previous Order of the Court, and then proceeds to hear the cause with the record so altered. If he should have erroneously struck out parts not affected by the Order, the attention of the accused, in his answer or evidence, will not have been called to the parts struck out,

for he would be entitled to consider them as no longer forming part of the charge; but if the Promoter, on Appeal, should succeed in restoring the passages in question, it would obviously become necessary to allow the Respondent an opportunity of meeting the restored charges.

In the present case their Lordships have thought it best to allow the Appellant to conduct his argument as, if the passages which he avers should not have been struck out still remained part of the record, and to found any argument upon such passages as he might be advised, provided the argument did not seek to establish a contravention by the Respondent of the 29th Article of Religion.

But their Lordships think it right to observe that it would be proper, in in future, that before any Appeal be presented to Her Majesty's in Council, in respect of an Order directing the reformation of Articles of Charge or other pleadings, the actual reformation which appears to the Judge to be required, should be made by him on the face of the Order, so that on Appeal the very passages omitted should be clearly brought under the judgment of this Committee, instead of an Order directing, by general reference, the nature of the alteration required.

On proceeding to the consideration of the Appeal from the final Decree of the Court of Arches, there is one point which was prominently brought forward in the opening of the case by the counsel for the Appellant, which it appears to their Lordships may be separately disposed of.

The Articles of Charge set forth several passages from the 2nd and 3rd editions of a work published by the Respondent, called "A Plea for Toleration in the Church of England, in a letter to the Rev. E. B. Pusey." Now the 2nd edition of this work was published in 1867, and the 3rd edition in 1868. The 3rd edition contains important corrections of expressions in the 2nd edition, which expressions form part of the charge against the Respondent. The original expressions and their correction are fairly stated and set forth by the Appellant in the 7th Article of Charge. (Appendix, page 18.) The learned Judge, in the Court below (Appendix, page 117), has stated that he has no doubt that the expressions originally used by the Respondent, viz., "the real actual and visible presence of the Lord upon the altars of our Churches," and again, "Who myself adore and teach the people to adore the consecrated elements, believing Christ to be in them—believing that under their veil is the sacred Body and blood of our Lord and Saviour Jesus Christ,"—"contravened the plain and clear intent of the Formularies of the Church." And the learned Judge has also set forth the alterations of these statements made in the 3rd edition of the Respondent's work, and on the passages so altered has found that the Respondent has not been guilty of a contravention of the Articles as alleged by the Promoter. Mr. Bennett's own words, in adopting the altered words, are as follows: "My meaning and that which passed through my mind in writing the original passages was precisely the same as that which is now conveyed in the words substituted, but as the original words were liable to a different construction from that in which I used them, I therefore most willingly in this edition adopt another formula to express my meaning." The learned Judge has (Appendix, page 117) regretted that these alterations made by Mr. Bennett in his 3rd edition are unaccompanied by any expression of regret or self-reproach on the Respondent's part for the mischief which his crude and rash expressions have caused. Their Lordships feel obliged to adopt the censure of the learned Judge on this point.

Upon this state of facts the learned Counsel urged that there had been no retractation of the original user, and that, in default of actual retractation, the learned Judge should have condemned the Respondent in respect of the words used by him in the 2nd edition of his work, though varied by the substituted words in the 3rd edition, and he cited several authorities for the purpose of supporting this argument.

But, without regarding the Respondent's language as a retractation, their Lordships think that it is competent for them to take into consideration any explanation that an accused person may give of the language used by him, and to determine whether such explanation is made *bonâ fide* and is entitled to credit. They attach great importance to the fact that the third edition was published before suit, and they think that they may accept his later words as the more correct expression of the Respondent's meaning.

In proceeding to consider the substance of the charges against the Respondent, their Lordships think it desirable to recall to mind the principles on which former decisions in similar cases have proceeded.

In the cases of Williams and Wilson (2 Moore's Reports, New Series, p. 423), their Lordships laid down as follows:—

"These prosecutions are in the nature of criminal proceedings, and it is necessary that there should be precision and distinctness in the accusation. The Articles of Charge must distinctly state the opinions which the Clerk has advisedly maintained, and set forth the passages in which those opinions are stated; and further the Articles must specify the doctrines of the Church which such opinions or teaching of the Clerk are alleged to contravene, and the particular Articles of Religion or portions of the Formularies which contain such doctrines. The accuser is, for the purpose of the charge, confined to the passages which are included and set out in the Articles as the matter of the accusation; but it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the accuser."

So in the judgment in the Gorham case—

"The question which we have to decide is, not whether the opinions are theologically sound or unsound, not whether upon some of the doctrines comprised in these opinions, other opinions opposite to them may or may not be held with equal or even greater reason by other learned and pious ministers of the Church; but whether these opinions now under our consideration are contrary or repugnant to the doctrines which the Church of England, by its Articles, Formularies and Rubrics, requires to be held by its ministers, so that upon the ground of those opinions the Appellant can lawfully be excluded from his benefice." . . . "This question must be decided by the Articles and the Liturgy; and we must apply to the construction of those books the same rules which have been long established, and are by law applicable to the construction of all written instruments. We must endeavour to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed." . . . . "There were different doctrines or opinions prevailing or under discussion at the times when the Articles aud Liturgy were framed, and ultimately made part of the law; but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them, or by the authorities by which they may be supposed to have

been influenced, or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The Articles and Liturgy, as we now have them, must be considered as the final result of the discussion which took place; not the representation of the opinions of any particular men, Calvinistic, Arminian, or any other; but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including both the sources from which the declared doctrine was derived, and the erroneous opinions which were to be corrected." . . . "This Court has no jurisdiction or authority to settle matters of faith or to determine what ought in any case to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England upon the true and legal construction of the Articles and Formularies."

Lord Stowell had long before said, in the case of *King's Proctor* v. *Stone*, "If any Article is really a subject of dubious interpretation, it would be highly improper for the Court to fix on one meaning and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them."

To the principles thus laid down their Lordships will adhere in the present case.

The attention of the Court has been directed to the successive revisions of the Book of Common Prayer, and to alterations or omissions which have been made in it at different times. Changes by which words or passages inculcating particular doctrines, or assuming a belief in them, have been struck out, are most material as evidence that the Church has deliberately ceased to affirm those doctrines in her public services. At the same time it is material to observe that the necessary effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, and not that it becomes unlawful to maintain them. In the public or common prayers and devotional offices of the Church all her members are expected and entitled to join; it is necessary, therefore, that such forms of worship as are prescribed by authority for general use should embody those beliefs only which are are assumed to be generally held by members of the Church.

In the case of *Westerton* v. *Liddell* (and again in *Martin* v. *Mackonochie*) their Lorships say, "In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be allowed." If the Minister be allowed to introduce at his own will variations in the rites and ceremonies that seem to him to interpret the doctrine of the service in a particular direction, the service ceases to be what it was meant to be, common ground on which all Church people may meet, though they differ about some doctrines. But the Church of England has wisely left a certain latitude of opinion in matters of belief, and has not insisted on a rigorous uniformity of thought which might reduce her communion to a narrow compass.

Dealing only with the 3rd edition of the Respondent's work, and having regard to their former decision, that the charge of contradicting the 29th Article of Religion as to reception by the wicked should be struck out, their Lordships may consider the remaining charges against the Respondent under three heads:—

1. As to the presence of Christ in the Holy Communion.

2. As to sacrifice in the Holy Communion.

3. As to adoration of Christ present in the Holy Communion.

The Respondent is charged with maintaining under these three heads the following propositions:—

1. That in the Sacrament of the Lord's Supper there is an actual presence of the true Body and Blood of our Lord in the consecrated bread and wine, by virtue of and upon the consecration, without or external to the communicant, and irrespective of the faith and worthiness of the communicant, and separately from the act of reception by the communicant; and it was contended by Counsel under this head that the true Body of Christ meant the natural Body.

2. That the Communion Table is an altar of sacrifice, at which the priest appears in a sacerdotal position at the celebration of the Holy Communion, and that at such celebration there is a great sacrifice or offering of our Lord by the ministering priest, in which the mediation of our Lord ascends from the altar to plead for the sins of men.

3. That adoration is due to Christ present upon the altars or communion tables of the churches, in the Sacrament, under the form of bread and wine, on the ground that under their veil is the Body and Blood of our Lord.

The several positions so maintained are averred, each and all, to be repugnant to the doctrines of our Church, as set forth in the Articles and Formularies in that behalf specially alleged.

Their Lordships are bound to consider, in the first place, what has been affirmed and what has been denied, in reference to the doctrine to which these three statements relate.

The 4th Article of Religion affirms:—

1. That Christ did truly rise from death and took again His Body, with flesh and bones and all things appertaining to the perfection of man's nature, wherewith He ascended into Heaven; and there sitteth until He return to judge all men at the Last Day.

In the 28th Article of Religion it is affirmed:—

1. "The Supper of the Lord is not only a sign of the love that Christians ought to have among themselves, one to another, but rather is a Sacrament of our redemption by Christ's death: insomuch that to such as rightly, worthily, and with faith receive the same, the bread which we break is a partaking of the body of Christ, and likewise the cup of blessing is a partaking of the blood of Christ."

2. "Transubstantiation (or the change of the substance of bread and wine) in the Supper of the Lord cannot be proved by Holy Writ; but is repugnant to the plain words of Scripture, overthroweth the nature of a sacrament, and hath given occasion to many superstitions."

3. "The Body of Christ is given, taken, and eaten in the Supper only after an heavenly and spiritual manner."

4. "The mean whereby the body of Christ is received and eaten in the supper, is faith."

5. "The Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped."

By the 29th Article of Religion it is affirmed:—

6. "The wicked and such as be void of a lively faith, although they do carnally and visibly press with their teeth (as St. Augustine saith) the Sacrament of the body and blood of Christ, yet in no wise are they partakers

of Christ; but rather to their condemnation do eat and drink the sign or sacrament of so great a thing."

By the 31st, it is affirmed:—

7. "The offering of Christ once made is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual; and there is none other satisfaction for sin, but that alone." And—

8. "The sacrifices of masses, in the which it was commonly said that the priest did offer Christ for the quick and the dead to have remission of pain or guilt were blasphemous fables and dangerous deceits."

9. In the Catechism it is stated that "the Body and Blood of Christ are verily and indeed taken and received by the faithful in the Lord's Supper."

Their Lordships proceed, with these passages before them, to examine the charges made against the Respondent. The first relates to the presence of the Body and Blood of Christ in the Holy Communion.

The Church of England in the passages just cited holds and teaches affirmatively that in the Lord's Supper the Body and Blood of Christ are given to, taken, and received by the faithful communicant. She implies, therefore, to that extent, a presence of Christ in the ordinance to the soul of the worthy recipient. As to the mode of this presence she affirms nothing, except that the body of Christ is "given, taken, and eaten in the supper only after an heavenly and spiritual manner," and that "the mean whereby the Body of Christ is received and eaten is faith." Any other presence than this—any presence which is not a presence to the soul of the faithful receiver—the Church does not by her Articles and Formularies affirm or require her ministers to accept. This cannot be stated too plainly. The question is, however, not what the Articles and Formularies affirm, but what they exclude. The Respondent maintains a presence which is (to use his own expression) "real, actual, objective," a presence in the Sacrament, a presence upon the altar, under the form of bread and wine. He does not appear to have used the expression "in the consecrated elements" in his 3rd Edition; this is one of the points on which the language of the 2nd Edition was altered. And the question raised by the Appeal is, whether his position is contradictory or repugnant to anything in the Articles or Formularies, so as to be properly made the ground of a criminal charge.

Setting aside the Declaration at the end of the Communion Office, which will be presently considered, we find nothing in the Articles and Formularies to which the Respondent's position is contradictory or repugnant.

The statement in the 28th Article of Religion that the body of Christ is given, taken, and eaten in the Lord's Supper, only after a heavenly and spiritual manner, excludes undoubtedly any manner of giving, taking, or receiving which is not heavenly or spiritual. The assertion of a "real, actual, objective" presence, introduces, indeed, terms not found in the Articles or Formularies; but it does not appear to affirm, expressly or by necessary implication, a presence other than spiritual, nor to be necessarily contradictory to the 28th Article of Religion.

The 29th Article of Religion, which is entitled "of the wicked which eat not the Body of Christ in the use of the Lord's Supper," and which affirms that the wicked and such as be void of a lively faith "are in no wise partakers of Christ," may suggest, indeed, an inference unfavourable to the Respondent's statements, but cannot be said to be plainly contradictory of them or necessarily to exclude them. The two propositions, that the faithful

receive Christ in the Lord's Supper, and that the wicked are in no wise partakers of Christ, when taken together, do not appear to be contradicted by the statement that there is a real, actual, objective presence of the Body and Blood of Christ in the sacrament after a heavenly and spiritual manner.

The "Declaration of Kneeling" should now be considered. It is as follows:—

"Whereas it is ordained in this office for the administration of the Lord's Supper, that the communicants should receive the same kneeling (which order is well meant for the signification of our humble and gratefnl acknowledgment of the benefits of Christ therein given to all worthy receivers, and for the avoiding of such profanation and disorder in the Holy Communion, as might otherwise ensue), yet, lest the same kneeling should by any persons either out of ignorance or infirmity, or out of malice and obstinacy be misconstrued and depraved, it is hereby declared, that thereby no adoration is intended, or ought to be done either unto the sacramental bread or wine there bodily received, or unto any corporal presence of Christ's natural Flesh and Blood, for the sacramental bread and wine remain still in their very natural substances, and therefore may not be adored (for that were idolatry, to be abhorred of all faithful Christians), and the natural Body and Blood of our Saviour Christ are in Heaven, and not here; it being against the truth of Christ's natural Body to be at one time in more places than one."

This Declaration originally appeared in the second Prayer Book of Edward VI, A.D. 1552, in which book the position of kneeling was positively enjoined upon those who received the Sacrament. It was issued by the King, and was ordered by the Council to be appended to the Prayer Book, but after the book had received the sanction of Parliament, so that it was not of statutory authority. From the Prayer Book of Elizabeth (1559) the Declaration was omitted. In 1662 it was inserted in the present Prayer Book, and became of equal authority with the rest of the Prayer Book. The form of the Declaration was somewhat altered; the words "Unto any real and essential presence there being of Christ's natural Flesh and Blood" were altered to "unto any corporal presence of Christ's natural Flesh and Blood," and the words "true natural Body" became "natural Body."

It was urged for the Appellant that, since the Church recognizes only one Body of Christ, the natural and now glorified Body which is spoken of in the Fourth Article of Religion, and since the Declaration asserts that this Body is "in Heaven and not here," the only presence in the Sacrament which can be held consistently with the Declaration is a presence to the soul of the communicant.

It was insisted that the word "natural" applied to the Body of Christ can convey no additional meaning, unless it be used to distinguish the true Body of Christ, which is his natural Body, from the Church, which is His Body in a mystical or figurative sense; and that the expression "corporal presence" cannot mean a presence in the manner or under the conditions in and under which material bodies are present or exist in space; that it must mean or include any presence whatever in the elements, as contradistinguished from a presence to the spiritual apprehension of the receiver. There can be no question, it was argued, as to the mode or manner of the presence; for no mode or manner of presence is conceivable which would reconcile the proposition that the true Body of Christ is in the elements, with the proposition that the natural Body is in heaven and not here.

Their Lordships are of opinion that these inferences, whether probable or

not, are by no means of that plain and certain character which the conclusion they are asked to draw from them requires. The matters to which they relate are confessedly not comprehensible, or very imperfectly comprehensible, by the human understanding; the province of reasoning as applied to them is therefore very limited; and the terms employed have not, and cannot have, that precision of meaning which the character of the argument demands. Concerning the mode of reception of the Body and Blood of Christ by the faithful communicant, the Church affirms nothing more than that it is heavenly and spiritual, and that the mean whereby we receive is faith.

Nor can their Lordships accede to the argument that the words "Corporal Presence of Christ's natural Flesh and Blood" must be understood as the Appellant understands them, and the phrase "Corporal Presence" regarded merely as an equivalent for the different expression in lieu of which it was substituted. On the contrary, it is at the least probable that, as the Declaration itself was introduced in order to conciliate scruples in one quarter, the alteration made in it was designed to remove objections entertained against it in another.

Their Lordships could not advise the condemnation of a clergyman for maintaining that the use in 1662 of the word "corporal" instead of the words "real and essential" in the Declaration of Kneeling was an intentional substitution, implying that there may be a real or essential presence as distinguished from a corporal presence.

The Respondent has nowhere alleged in terms a corporal presence of the natural Body of Christ in the elements; he has never affirmed that the Body of Christ is present in a "corporal" or "natural" manner. On the contrary, he has denied this, and he speaks of the presence in which he believes as "spiritual," "supernatural," "sacramental," "mystical," "ineffable."

II. The next charge against the Respondent is, that he has maintained that the Communion Table is an altar of sacrifice, at which the priest appears in a sacerdotal position at the celebration of the Holy Communion, and that at such celebration there is a great sacrifice or offering of our Lord by the ministering priest, in which the mediation of our Lord ascends from the altar to plead for the sins of men.

The Church of England does not by her Articles or Formularies, teach or affirm the doctrine maintained by the Respondent. That she has deliberately ceased to do so would clearly appear from a comparison of the present Communion Office with that in King Edward's First Book, and of this again with the Canon of the Mass in the Sarum Missal.

This subject was fully discussed before their Lordships in Westerton *v.* Liddell, when it was decided that the "change in the view taken of the sacrament naturally called for a corresponding change in the altar. It was no longer to be an altar of sacrifice, but merely a table at which the communicants were to partake of the Lord's Supper."

The thirty-first Article of Religion, after laying down the proposition (which is adopted also, in words nearly the same, in the Prayer of Consecration), that "the offering of Christ once made, is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual," and that "there is none other satisfaction for sin but that alone," proceeds, on the strength of these propositions, to say that "the sacrifices of masses, in the which it was commonly said that the Priest did offer Christ for the quick and the dead to have remission of pain or guilt, were blasphemous fables and dangerous deceits."

It is not lawful for a clergyman to contradict, expressly or by inference, either the proposition which forms the first part of this Article, or any proposition plainly deducible from the condemnation of propitiatory masses which forms the second part of it, and is stated as a corollary to the first.

It is not lawful for a clergyman to teach that the Sacrifice or offering of Christ upon the Cross, or the redemption, propitiation, or satisfaction, wrought by it, is or can be repeated in the ordinance of the Lord's Supper; nor that in that ordinance there is or can be any sacrifice or offering of Christ which is efficacious in the sense in which Christ's death is efficacious, to procure the remission of the guilt or punishment of sins.

It is well known, however, that by many divines of eminence, the word Sacrifice has been applied to the Lord's Supper in the sense not of a true propitiatory or atoning Sacrifice, effectual as a satisfaction for sin, but of a rite which calls to remembrance and represents before God that one true Sacrifice. To take one example, Bishop Bull says:—

"In the Eucharist then Christ is offered, not hypostatically, as the Trent Fathers have determined, for so he was but once offered, but commemoratively only; and this commemoration is made to God the Father, and is not a bare remembering or putting ourselves in mind of Him. For every Sacrifice is directed to God, and the oblation therein made, whatsoever it be, hath Him for its object, and not man. In the Holy Eucharist, therefore, we set before God the bread and wine, 'as figures or images of the precious Blood of Christ shed for us, and of his precious Body' (they are the very words of the Clementine Liturgy), and plead to God the merit of His Son's Sacrifice once offered on the Cross for us sinners, and in this Sacrament represented, beseeching Him for the sake thereof to bestow His heavenly blessings on us."—Bull's Works, vol. ii. p. 22.

The distinction between an act by which a satisfaction for sin is made, and a devotional rite by which the satisfaction so made is represented and pleaded before God, is clear, though it is liable to be obscured, not only in the apprehension of the ignorant, but by the tendency of theologians to exalt the importance of the rite till the distinction itself well nigh disappears. To apply the word sacrifice in the sense in which Bishop Bull has used it to the ordinance of the Lord's Supper, though it may be liable to abuse and misapprehension, does not appear to be a contravention of any proposition legitimately deducible from the thirty-ninth Article. It is not clear to their Lordships that the Respondent has so used the word "sacrifice" as to contradict the language of the Articles.

III. Their Lordships now proceed to the third charge, which relates to the adoration of Christ present in the Sacrament.

The 20th and 27th Articles of Charge contain the false doctrines alleged to be held by Mr. Bennett. The 20th charges that he affirms the doctrine that adoration or worship is due to the consecrated bread and wine.

The 27th, that he affirms that adoration is due to Christ present upon the altars of our churches in the Sacrament of the Holy Communion, under the form of bread and wine, on the ground that under their veil is the Sacred Body and Blood of our Lord (the passages referred to for proof are set out in the 7th Article).

The 31st Article charges that these doctrines are contrary to the 28th Article of Religion, and the Declaration on Kneeling.

The passages relied on as the ground of these charges are the following:—

"The reader will observe that in the two first editions, at page 3, the

words were: '*The real actual and visible Presence of our Lord upon the Altars of our Churches.*' In the present edition he will find at page 2 the following words substituted: '*The real and actual Presence of our Lord under the form of bread and wine upon the Altars of our Churches.*' He will also observe that, at page 14 in the former editions, the words were:—'*Who myself adore and teach the people to adore the consecrated Elements, believing Christ to be in them—believing that under their veil is the sacred Body and Blood of my Lord and Saviour Jesus Christ.*' He will now find the following words substituted:—'*Who myself adore and teach the people to adore Christ present in the Sacrament, under the form of Bread and Wine, believing that under their veil is the sacred Body and Blood of my Lord and Saviour Jesus Christ.*'"

"The three great doctrines on which the Catholic Church has to take her stand are these:—I, The Real Objective Presence of our Blessed Lord in the Eucharist; II, 'The sacrifice offered by the Priest;' and III, The adoration due to the Presence of our Blessed Lord therein."

"Well, I do not know what others of my brethren in the Priesthood may think,—I do not wish to compromise them by anything that I say or do,—but seeing that I am one of those who burn lighted candles at the Altar in the daytime; who use incense at the Holy Sacrifice; who use the Eucharistic Vestments; who elevate the Blessed Sacrament; who myself adore, and teach the people to adore, Christ present in the Sacrament, under the form of bread and wine; believing that under their veil *is the sacred Body and Blood of my Lord* and Saviour Jesus Christ:—seeing all this it may be conceived that I cannot rest very much at ease under the imputations above recited."

Their Lordships agree with the learned Judge of the Court below that the doctrine charged in the 20th Article, namely, that adoration is due to the consecrated elements, is contrary to law, and must be condemned. But they have admitted, as the learned Judge has done, Mr. Bennett's explanation of that language, and therefore they are not called upon to condemn Mr. Bennett under the 20th Article. The 27th Article of Charge therefore alone remains for decision; it is as follows:—

"That in or by the passages lettered N, O, and S, hereinbefore set forth in the seventh preceding Article you have maintained or affirmed and promulgated the doctrine that adoration is due to Christ, present upon the Altars (thereby referring to the Communion Tables) of the Churches of the said United Church of England and Ireland in the Sacrament of the Holy Communion under the form of bread and wine, on the ground that under their veil is the sacred Body and Blood of our Lord and Saviour Jesus Christ."

Their Lordships have now to consider whether or not the passages from the Respondent's writings above set forth are necessarily repugnant to or contradictory of the 28th Article of Religion, or of the Declaration of Kneeling, as alleged in the 31st Article of Charge.

The Declaration of Kneeling states that, by the direction that the communicants shall receive the consecrated elements kneeling, "no adoration is intended or ought to be done either to the Sacramental bread and wine there bodily received, or to any corporal presence of Christ's natural Flesh and Blood."

According to this declaration, neither the elements nor any corporal presence of Christ therein ought to be adored.

The 28th Article lays down that "the Sacrament of the Lord's Supper was not by Christ's ordinance, reserved, carried about, lifted up or worshipped."

In the 25th Article it had been affirmed that "the Sacraments were not ordained by Christ to be gazed upon, or to be carried about, but that we should duly use them."

It was laid down in Martin *v.* Mackonochie that such acts as the elevation of the cup and paten, and kneeling and prostration of the minister before them, were unlawful, because they were not prescribed in the Rubric of the Communion Office, and because acts not prescribed were to be taken as forbidden. Their Lordships in that judgment adopted the words of the Committee in Westerton *v.* Liddell; "for the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted."

It follows then that the Church of England has forbidden all acts of adoration to the Sacrament, understanding by that the consecrated elements. She has been careful to exclude any act of adoration on the part of the minister at or after the consecration of the elements and to explain the posture of kneeling prescribed by the Rubric. If the charge against Mr. Bennett were that he had performed an outward act of adoration on any occasion in the service, the principles laid down in Martin *v.* Mackonochie would apply to this case. Such an act could not be done except in the service, because the Sacrament may not be "reserved." But even if the Respondent's words are a confession of an unlawful act it is questionable whether such a confession would amount to false doctrine. And it is also fair to remember, in the Respondent's favour, that the judgment in the case of Martin *v.* Mackonochie, which established the unlawfulness of introducing acts of adoration, was not delivered until December 23, 1868, after the publication of the words that are now impugned. Some of their Lordships have doubted whether the word "adore," though it seems to point rather to acts of worship, such as are forbidden by the 28th Article, may not be construed to refer to mental adoration, or prayers addressed to Christ present spiritually in the Sacrament, which does not necessarily imply any adoration of the consecrated elements or of any corporal or natural presence therein.

Upon the whole, their Lordships, not without doubts and division of opinions, have come to the conclusion that this charge is not so clearly made out as the rules which govern penal proceedings require. Mr. Bennett is entitled to the benefit of any doubt that may exist. His language has been rash, but as it appears to the majority of their Lordships that his words can be construed so as not to be plainly repugnant to the two passages articled against them, their Lordships will give him the benefit of the doubt that has been raised.

Their Lordships having arived at the conclusion that they must advise Her Majesty that the Appeal must be dismissed, feel bound to add that there is much in the Judgment of the learned Judge in the Court below with which they are unable to concur. The learned Judge has endeavoured to settle by a mass of authorities what is the doctrine of the Church of England on the subject of the Holy Communion. It is not the part of the Court of Arches nor of this Committee, to usurp the functions of a Synod or Council. Happily their duties are much more circumscribed, namely, to ascertain whether certain statements are so far repugnant to, or contradictory of, the language of the Articles and Formularies, construed in their plain meaning, that they should receive judicial condemnation.

Their Lordships will not attempt to examine in detail the catena of authorities which the Judge of the Arches has brought together, nor that of

the learned Counsel who appeared for the Appellant. No mode of argument is more fallacious on a subject so abstruse and of so many aspects; short extracts, even where candidly made, as in this case, give no fair impression of an author's mind. Thus Dean Jackson is quoted in the Judgment; but the quotation omits the preceding sentence* which gives to the whole passage a meaning difficult to reconcile with the purpose for which it is used; while the opinion of this eminent divine would have been more correctly represented by referring also to the following remarkable passage in a previous chapter of his work: "What need then is there of His bodily presence in the Sacrament, or of any other presence than the influence or emission of virtue from His heavenly sanctuary into our souls? He has left us the consecrated elements of bread and wine, to be unto us more than the hem of His garment. If we do but touch and taste them with the same faith by which this woman touched the hem of His garment, our same faith shall make us whole."† Several of those who are cited by the learned Judge are living persons of greater or less note, who cannot rank as authorities for the history of a great controversy.

One of the authorities is so questionable, that it requires a passing examination. The learned Judge, after quoting the 28th Article of Religion, introduces as "a '*contemporanea expositio*,' from the compiler of this article, which cannot, I think, be gainsaid," a letter from Bishop Gheast to Cecil, under the date 1556 (probably a mistake for 1566) explaining the sense which he put upon the word "only" in the 28th Article. Gheast does not say that he was the "compiler" of the 28th Article, all but one sentence of which had been in substance in the Articles of 1552; and the context shows that he used the word "Article" only of this sentence, which, he says, was "of mine own penning." Upon the faith of this letter, genuine or not, avowedly written for a personal purpose ("for mine own purgation") is founded an exposition of the words "only after a heavenly and spiritual manner," as meaning that though a man "took Christ's Body in his hand, received it with his mouth, and that corporally, naturally, really, substantially, and carnally . . . yet did he not for all that see it, feel it, smell it, nor taste it." Upon this alleged exposition their Lordships feel themselves free to observe that the words "only after a heavenly and spiritual manner," do not appear to contain or involve the words "corporally, naturally, and carnally," but to exclude them; and that it is the Article, and not the questionable comments of a doubtful letter written for personal motives, which is binding on the Clergy and on this Court.

Their Lordships recall once more, in acknowledging the learning that has been brought to bear upon this case, the principle which this Committee has long since laid down. "There were different doctrines or opinions prevailing or under discussion at the times when the Articles and Liturgy were framed, and ultimately made part of the law; but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them, or by the authorities by which they may be supposed to have been influenced, or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The Articles and Liturgy, as we now have them, must be considered as the final result of the discussion which took place; not the representation of the opinions of any particular men,

* Works, vol. x, p. 41.

† Works. vol. ix, p. 611.

Calvinistic, Arminian, or any other; but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including both the sources from which the declared doctrine was derived, and the erroneous opinions which were to be corrected."*

Citations from established authors may be of use to show that "the liberty which was left by the Articles and Formularies has been actually enjoyed and exercised by the members and ministers of the Church of England."* But, to say the least, very few of the quotations in the judgment exhibit the same freedom of language as do the extracts from Mr. Bennett. And after every authority had been examined, there would still remain the question that is before this Committee, whether the license or liberty is really allowed by the Articles and Formularies—whether anything has been said by the Respondent which plainly contradicts them. If the Respondent had made statements contradicting the Articles or Formularies, the citation of great names would not have protected him; if he has not done so, he is safe without their protection.

There is one passage in the judgment which seems especially to call for comment:—

"With respect to the second and corrected edition of his pamphlet, and the other work for which he is articled, I say that the objective, actual, and real presence, or the spiritual, real presence, a presence external to the act of the communicant, appears to me to be the doctrine which the Formularies of our Church, duly considered and construed so as to be harmonious, intended to maintain. But I do not lay down this as a position of law, nor do I say that what is called the Receptionist Doctrine is inadmissible; nor do I pronounce on any other teaching with respect to the mode of presence. I mean to do no such thing by this judgment. I mean by it to pronounce only that to describe the mode of presence as objective, real, actual, and spiritual, is certainly not contrary to the law."

Their Lordships regret that the learned Judge should have put forth this extra-judicial statement, in which he adopts words that are not used in the Articles or Formularies as expressing their doctrine. The word "receptionist" is as foreign to the Articles as the word "objective." Their Lordships have already said that any presence which is not a presence to the soul of the faithful receiver, the Church does not by her Articles and Formularies affirm. They need not ask whether there is really any doubt as to the admissibility of the doctrine of Hooker and Waterland, who appear to be described as "Receptionists," in the Church of which they have been two of the greatest ornaments.

Their Lordships have not arrived at their decision without great anxiety and occasional doubt. The subject is one which has always moved the deepest feelings of religious men, and will continue to do so. There might have been expected from a theologian dealing with this subject, if not a charitable regard for the feelings of others, at least a careful preparation and an exactness in the use of terms. The very divine whose opinions Mr. Bennett seems to have sought to represent, was obliged himself to point out how erroneous was his statement of those opinions. The Respondent corrected the manifest error without an expression of regret at the pain he may have caused to many by his careless language. Even in their maturer form, his words are rash and ill-judged, and are perilously near a violation of the law.

* Judgment of Privy Council, Gorham Case.

But the Committee have not allowed any feeling of disapproval to interfere with the real duty before them, to decide whether the language of the Respondent was so plainly repugnant to the Articles and Formularies as to call for judicial condemnation; and, as these proceedings are highly penal, to construe in his favour every reasonable doubt.

There will be no order as to costs, as the Respondent has not appeared.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hebbert, heretofore Elphinstone, v. *Purchas, from the Arches Court of Canterbury; delivered 23rd February,* 1871.

[The insertions between square brackets are corrections of the quotations.]

Present:—Lord Chancellor [Hatherley]; Archbishop of York [Thomson]; Bishop of London [Jackson]; Lord Chelmsford.

In this case, which comes to us from the Arches Court of Canterbury, the learned Judge of that Court has directed a monition to issue to the Rev. John Purchas as to several matters and things complained of by the Promoter, and has condemned him in costs; and the Defendant has not appealed. But as to certain charges contained in the 16th, 17th, 20th, 25th, 36th, and 38th Articles of Charge, the learned Judge has refused or omitted to direct a monition to issue against the Defendant, and to condemn him in the costs of these Articles; and against the decision upon these Articles the Promoter has appealed.

The substitution of Henry Hebbert as Promoter, for the purpose of this Appeal, for Charles James Elphinstone, the Promoter in the Court below, since deceased, has been allowed by a former judgment of this Committee.

The Rev. John Purchas, the Respondent, has not appeared, and the Committee has not had the assistance of the argument of counsel on his behalf.

The charges which are the subject of this Appeal are that the Respondent has offended against the Statute Law and the Constitutions and Canons Ecclesiastical, by administering wine mixed with water, instead of wine, to the communicants, as pleaded in the 16th Article; and by standing with his back to the people, between the people and the Holy Table, whilst reading the Prayer of Consecration in the Holy Communion, as pleaded in the 17th Article; and by the use of wafer bread instead of bread such as is usual to be eaten, in the administration of the Holy Communion, as pleaded in the 20th Article; and by causing holy water, or water previously blessed or consecrated, to be poured into divers receptacles for the same in the said church, in order that the same might be used by persons in the congregation, or by causing or permitting the same to be used by others, as pleaded in the 25th Article; and by himself wearing and sanctioning and authorizing the wearing by other officiating ministers, whilst officiating in the Communion Service, and in the administration of the Holy Communion in the said church, a vestment called a chasuble, as pleaded in the 36th Article; and by himself wearing, and causing or suffering to be worn by other officiating clergy, when officiating in the Communion Service in the said church, certain other vestments called dalmatics, tunics or tunicles, and albs, and by himself wearing, carrying, or causing or suffering other officiating clergy in the same church

to wear or bear in their hand, a certain cap called a biretta, during Divine Service, as pleaded in the 38th Article. (Case pp. 9, 10.)

We find it convenient to adopt the order followed by the learned Dean of the Arches, and to examine first, the charge of wearing and causing to be worn, a chasuble, tunics, or tunicles and albs, in the celebration of the Holy Communion.

It is necessary to review shortly the history of the Rubric, usually known as the "Ornaments-Rubric," which governs this question.

The first Prayer Book of King Edward VI, 1549, contains the following Rubric at the beginning of the Communion office:—

"Upon the day and at the time appointed for the ministration of the Holy Communion, the priest that shall execute the holy ministry shall put upon him the vesture appointed for that ministration, that is to say, a white albe, plain, with a vestment or cope, and where there be many priests or deacons, then [*for* then *read* there] so many shall be ready to help the priest in the ministration as shall be requisite, and shall have upon them likewise the vestures appointed for their ministry, that is to say, albes with tunicles."

In the second Prayer Book of Edward VI (1552) this was altered, and it was ordered that the minister "shall use neither albe, vestment, nor cope, but being archbishop or bishop he shall have and wear a rochet, and being a priest or deacon he shall have and wear a surplice only."

The Prayer Book of Elizabeth (A.D. 1559) provided that "the minister at the time of the communion, and at all other times of [*for* of *read* in] his ministration, shall use such ornaments in the church as were in use by authority of Parliament in the second year of the reign of King Edward [the *sic*] VI, according to the Act of Parliament set in the beginning of this book."

This Committee has already decided (Liddell *v.* Westerton), that the words "by authority of Parliament in the second year of the reign of King Edward VI," refer to the first Prayer Book of King Edward VI.

The Act of Parliament set in the beginning of Elizabeth's book is Queen Elizabeth's Act of Uniformity, and the 25th Clause of that Act contains a proviso, "that such ornaments of the Church and [of *sic*] the ministers thereof shall be retained and be in use, as was in this Church of England by authority of Parliament in the second year of the reign of King Edward VI, until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of the [*for* the *read* her] Commissioners as [*dele* as] appointed and authorized under the Great Seal of England for causes Ecclesiastical, or of the Metropolitan of this Realm."

The Prayer Book, therefore, refers to the Act, and the Act clearly contemplated further directions to be given by the Queen, with the advice of Commissioners or of the Metropolitan. It was not, apparently, thought desirable to effect an immediate outward change of ceremonies, although the adoption of the second Prayer Book of Edward VI, in lieu of the first, had effected a great change in the very substance of the Communion Service, with which the theory of the peculiar vestments (the albe and chasuble) was closely connected.

The rubric and the proviso together seem to restore for the present the ornaments of the minister which the second Prayer Book of King Edward had taken away. But Sandys, afterwards Archbishop of York, who assisted at the revision of the Prayer Book, gives to Archbishop Parker a different suggestion:—"Our gloss upon this text," he says, "is, that we shall not

be forced to use them (the ornaments), but that others in the meantime shall not convey them away, but that they shall [*for* shall *read* may] remain for the Queen." (Burnet's Reformation, vol. ii, Records, p. 332.) The injunctions of Elizabeth appeared in the same year, 1559, and one of them orders that "the churchwardens of every parish shall deliver unto the [*for* the *read* our] visitors the inventories of vestments, copes, and other ornaments, plate, books, and specially of grails, couchers, legends, processionals, hymnals, manuals, portasses, and such like appertaining to the Church." (Cardwell Doc. Annals I, 228.) Commissioners began to carry out these injunctions in the same year. One of their Returns is in the Record Office (Calendar of State Papers, Domestic, 1547-1580, p. 148), which shows that they chiefly occupied themselves in taking inventories of Church ornaments and of the service books in use.

In the year 1564 appeared the advertisements of Elizabeth. They make order for the vesture of the minister in these words:—"In the (*dele* the] ministration of the Holy Communion now in [*for* now in *read* in the] Cathedral and Collegiate churches, the principal minister shall use a cope, with gospeler and epistoler agreeably; and at all other prayers to be said at the said [*dele* said] Communion Table to use no copes but surplices."

"That every minister saying any public prayers or ministering [of *sic*] the Sacraments or other rites of the Church, shall wear a comely surplice with sleeves, to be provided at the charge [s *sic*] of the parish." (Cardwell Doc. An. I, 326.)

These Advertisements were very actively enforced within a few years of their publication. An inventory of the ornaments of 150 parishes in the Diocese of Lincoln, A.D. 1565-1566, has been published by Mr. Edward Peacock; and it shows that the chasubles or vestments and the albs, were systematically defaced, destroyed, or put to other uses, and a precise account was rendered of the mode of their destruction. Proceedings took place under Commissions in Lancashire in 1565 and 1570; in Carlisle in 1573 and following years, when "vestments seem to have disappeared altogether." (Rev. J. Raine, "Vestments," London, 1866.) There is no reason to doubt that all through the country, commissions were issued to enforce the observance of the advertisements within a few years after they were drawn up.

The Visitation Articles of the Archbishops and Bishops about this time show that the operation of the advertisements had been rapid and complete. Archbishop Grindal, in 1571, inquires, "whether all vestments, albs, tunicles, stoles, phanons, pixes, paxes, hand-bells, sacring-bells, censers, crismatories, crosses, candlesticks, holy water stocks, images, and such other reliques and monuments of superstition and idolatrie be utterly defaced, broken and destroyed." (2nd Report, Ritual Commission, p. 408*a*.) Archbishop Parker in 1575 asks, "in the time of celebration of Divine service, whether they wear surplices." (2 Ritual Commission, p. 416*a*.) Aylmer, Bishop of London, uses the same form of question as Archbishop Grindal (Ibid, p. 418*b*.) Sandys, Archbishop of York, inquired in 1578, "whether your parson, vicar or curate, at all times in saying the Common Prayer upon Sundays and holydays,, and in administering of the Sacrament [s *sic*] doth use and retain [*for* retain *read* weare] the surplice yea or nay," [*for* nay *read* no]. (Ibid, p. 422*a*.)

Upon the whole, there is abundant evidence that within a few years after the advertisements were issued, the vestments used in the Mass entirely disappeared.

It is true that for some years after the appearance of the Advertisements, great reluctance was exhibited by the Puritan party to the use of the surplice, and, in the struggle against the use, they sometimes asserted that, if the surplice were insisted upon, then, by virtue of the Rubric and Act of Parliament, the other vestments mentioned in the first Prayer Book of Edward VI should also be used.

In a somewhat rare tract, printed in the reign of James I, 1605, and addressed to the Bishop of Worcester, defending "the not exact use of the authorized Book of Common Prayer," the writer (p. 34) argues that no such order was made by the Queen as was directed by the Act of Parliament, yet even he admits that the Metropolitan, "on the Queen's mandative letters that some order might be taken, had conference and communication, and at the last, by assent and consent of the Ecclesiastical Commissioners, did think such orders as were specified in the Advertisements meet and convenient to be used and followed" (p. 36); but he asserts that they were of no value, since "the Queen's assent was not yielded."

This last proposition can hardly be maintained; for if the Queen's mandative letter preceded the compilation of the Advertisements, and if, as it appears abundantly, they were afterwards enforced as by her authority, her assent must be presumed. It appears probable that the Queen hesitated before the Advertisements were thus enforced, as to which see a remarkable letter from the Archbishop to Cecil, on the 28th March, 1566, cited by Mr. Perry in his book on "Lawful Church Ornaments," (p. 209), from the Parker Correspondence, on which Mr. Perry remarks "it would seem that the Archbishop's application had at length some success, for immediately afterwards he sent his letter to the Bishop of London for conformity," and in the letter to the Bishop he requests him "to transmit the Book of Advertisements to the other Suffragans of the Province."

But, as has been said, the contemporaneous evidence as to the abolition of all vestments obnoxious to the Puritan party (other than the surplice, hood, and tippett, and the square cap) is abundant.

In a scarce book, called "A Part of a Register," in which is a considerable number of documents collected by those who objected to Church Ritual, the complaint is uniformly against copes and surplices. Thus, in a letter by A. G., 1570, page 13, he complains of "crossing, coping, and surplessing." A Report of the Examination of Smith, Nixon, and others before the Lord Mayor, the Bishop of London, and other Commisioners, 1567, page 28, describe Hawkins, one of the accused, as saying, "Surplesses and copes be superstitious and idolatrous." Ireland, another of them (page 32) says to the Bishop, "But you go like one of the Mass priests still;" to which the Bishop replies,—*You see me wear a cope or a surpless at Paul's. I had rather minister without these things, but for order's sake and for obedience to the Prince.*"

In another of these documents, called "A View of Antichrist, His Laws and Ceremonies," there is a careful enumeration of ornaments complained of as Popish, not mentioning alb nor chasuble; but (page 63) there is mention of "the cap, the tippet, the surplice for small churches, the cope for great churches, furred hoods in summer for the great doctors, silken hoods in their quiers upon a surplesse, and the grey amise with the catte's tails." This mention of the amise is the only notice in the many tracts collected in the Register of any specific vestment other than the surplice and cope being worn. But in the same book is contained "A Letter by Master Robert

Johnson to Master Edwin Sandys (1573)," in which, at page 104, he says, "You must yield some reason why the tippet is commended and the stole forbidden; why the vestment is put away and the cope retained; why the alb is laid aside and the surplice is used; or why the chalice is forbidden in the Bishop of Canterbury's Articles or the grey amice by the Canon more than the rest, why [*for* why *read* what] have they offended, &c." Edward Dering (1593), in another tract in the same book, speaks of the grey amice having been specially forbidden in the "Book of the Discipline of the Church of England." He goes on to say that other vestments, equally superstitious, are used; and in a passage immediately before this he asks, "how he can subscribe to the ceremonies in Cathedral Churches, where they have the priest, Dean, and Sub-dean in copes and vestments, all as before;" but that he is alluding in this to the cope and surplice is plain both from the before-cited statement of the Bishop of London to Hawkins, and from the question in Johnson's tract "Why the vestment is put away and the cope retained, the alb laid aside and the surplice in use;" and the enumeration of Popish ornaments in "The View of Antichrist."

Now all the tracts above cited are dated within ten years after the date of the advertisements, and the complaints so bitterly made as to the cope and surplice would certainly have been extended to the alb and chasuble had they not then ceased to exist.

In the correspondence with foreign Reformers, called the "Zurich Letters," the controversy is treated as having become confined to the cope and surplice.

At the Hampton Court Conference the Puritans objected to the surplice, as "a kind of garment which the priests of Isis used to wear." (Cardwell Conferences, p. 200). There was evidently no other vestment in use to which they could object. The revised Prayer Book, issued soon after, retained the ornaments-Rubric in the same form as in the Prayer Book of Queen Elizabeth. The Canons of 1603-4 enacted by both Convocations, and ratified by the King's consent, sanctioned the use of this Prayer Book. But whilst thus implicitly sanctioning the ornaments-Rubric, the Canons also provide specially for the vesture of the minister. Canon 24 directs the use of "a decent cope" for the principal minister in the Holy Communion in Cathedrals and Collegiate Churches "according to the Advertisements published Anno 7 Elizabeth;" and Canon 58 directs that "every minister saying the public prayers or ministering the Sacraments or other rites of the church shall use [*for* use *read* wear] a decent and comely surplice with sleeves, to be provided at the charge of the parish."

Their Lordships think it needless to adduce authorities to show that there was no attempt to revive or use the chasuble, alb, and tunicle, between the years 1604 and 1662.

The Ornaments-Rubric of 1662 is as follows:—"And here it [*dele* it] is to be noted that such ornaments of the church and of the minister [s *sic*] thereof at all times of their ministration, shall be retained and be in use as were in this Church of England by the authority of Parliament in the second year of the reign of King Edward VI." The form of this Rubric is different from that of the preceding Prayer Book, and follows, for the most part, the wording of the proviso of the Act of Queen Elizabeth.

The learned Judge, in the Court below, assumes (Appendix, p. 74) that the Puritan party at the Savoy Conference, objected to *this* Rubric: whereas it was the Rubric of James that they were discussing. Upon that, the

Puritans observed that, "Inasmuch [*read* Forasmuch] as this Rubric seemeth to bring back the cope, alb, [&c. *sic*] and other vestments forbidden by the Common Prayer Book, 5 & 6 Edward VI, and so for [*for* for *read* our] reasons alleged against ceremonies under our eighteenth general exception, we deem [*for* deem *read* desire] it may be wholly left out." The Rubric had been in force for nearly 60 years, and they do not allege that the vestments had been brought back; nor would a total omission of the Rubric have been a protection against them. The Bishops in their answer show that they understand the surplice to be in question, and not the vestments. (Cardwell Conferences, 314, 345, 351). But the learned Judge through this oversight has overlooked the most important part of the proceedings. The Bishops determined that the Rubric "should continue as it is." But after this they did, in fact, re-cast it entirely. It must not be assumed that alterations made under such circumstances were made without thought, and are of no importance. The Rubric had directed the minister to "use at the time of the Communion, and at all other times of [*for* of *read* in] his ministrations," [*dele* s] the ornaments in question. The statute of Elizabeth did not direct such use nor refer to any special times of ministration, but it ordered simply the retaining of the ornaments till further order made by the Queen. The Bishops threw aside the form of the old Rubric and adopted that of the Statute of Elizabeth, but added the words "at all times of their ministration" without the words which had in all former Rubrics distinguished the Holy Communion from other ministrations; a mode of expression more suitable to a state of things wherein the vestments for all ministrations had become the same. The change also brought in the word "retained," which, it has been argued, would not include things already obsolete. Whatever be the force of these two arguments, the fact is clear that the Puritans objected to a Rubric differing from this; and that after their objections, the Rubric was re-cast, and brought into its present form.

With regard to the suggestion attributed to the House of Lords, "whether the Rubric should not be mended where all vestments in time of Divine service are now commanded which were used by [*for* by *read* 2] Edward VI" ("Cardwell Conferences," p. 274), the learned Judge has overlooked the fact that this applies to the earlier Rubric; and the suggestion did not emanate from the House of Lords, nor was it ever adopted by that body. And the learned Judge omits to observe that the Rubric of James, which was objected to, was amended after the suggestion.

From the passing of the Act of Uniformity there is abundant evidence to show that the vestments in question were not used at all. Their Lordships may refer to the various Visitation Articles published in the Second Report of the Ritual Commission and elsewhere, as showing that the surplice alone was to be used, and that deviations from that rule were on the side of defect, and not in the direction of returning to the vestments of the Mass. Some of these Articles were published by Bishop Cosin and others who took part in the revision of the Prayer Book. In the 6th Article Bishop Cosin inquires "have you a large and decent surplice (one or more) for the minister to wear at all times of his publick ministration in the church?" (2 Ritual Commission, 601 *a*.) This repetition of the words "at all times of his ministration," the exact words of the Rubric, is very significant as a contemporaneous exposition of it by one of its framers.

These, then, are the leading historical facts with which we have to deal in the difficult task of construing the Rubric of Ornaments. The vestment or

cope, alb, and tunicle were ordered by the first Prayer Book of Edward VI. They were abolished by the Prayer Book of 1552, and the surplice was substituted. They were provisionally restored by the Statute of Elizabeth, and by her Prayer Book of 1559. But the Injunctions and the Advertisements of Elizabeth established a new order within a few years from the passing of the Statute, under which chasuble, albe, and tunicle disappeared. The canons of 1603-4, adopting anew the reference to the Rubric of Edward VI, sanctioned in express terms all that the advertisements had done in the matter of the vestments, and ordered the surplice only to be used in parish churches. The revisers of our present Prayer Book in 1662, under another form of words, repeated the reference to the second year of Edward VI, and they did so advisedly, after attention had been called to the possibility of a return to the vestments.

The authority of the Advertisements has been questioned on the ground that it has never been shown that they received the assent of the Queen. Supposing, for the sake of argument, that the Advertisements did not receive the official assent of the Queen, but were acted upon under a number of Royal Commissions, and with the approval of the Metropolitan, their Lordships think this was a "taking other order" within the meaning of the Statute. There is no doubt that the Advertisements were carried into effect as legally binding, and were enforced by Royal Commissions. There is no doubt that they were accepted in some cases by reluctant people, as of legal obligation; and their authority is expressly recognized by the 24th canon of 1603-4.

In the case of Macdougall *v.* Purrier (4 Bligh's Reports, 433) the House of Lords presumed the enrolment in Chancery of a Decree of Commissioners appointed by an Act of Henry VIII for settling the tithes in London, although no such enrolment could be found, on the principle that where instruments have been long acted on and acquiesced in by parties interested in opposing their effect, all formalities shall be presumed to have been observed. No special form of consulting the Metropolitan is prescribed to the Queen.

Their Lordships are now called on to determine the force of the Rubric of 1662, and its effect upon other regulations, such as the Canons of 1603-4. They do not disguise from themselves that the task is difficult.

The learned Judge in the Court below has said that "the plain words of the Statute, according to the ordinary principles of interpretation, and the construction which they have received in two Judgments of the Privy Council, oblige him to presume that the ornaments of the Minister, mentioned in the first Prayer Book of Edward VI, are those to which the present Rubric referred." "They are, for Ministers below the order of Bishops, and when officiating at the Communion Service, cope, vestment, or chasuble, surplice, alb, and tunicle; in all other services the surplice only, except that in Cathedral Churches and Colleges the academical hood may be also worn." He considers that the object of the advertisements of Elizabeth "was to secure as great an amount of decent Ritual as the circumstance of the time would permit." (Appendix, p. 77.)

"As to the Visitation Articles," from the time of the Statute of Charles II, the learned Judge observes, "the same principle applies to them as to the Advertisements and Canons, and indeed as to every attempt to procure a decent ritual since Queen Elizabeth's time; namely, that the authorities were content to order the minimum of what was requisite for this purpose." (Appendix, p. 81.) Remarking upon the question whether the consent of

the King to the Canons of 1603-4 could be held to be an execution of the powers given to the Queen by the Statute of Elizabeth, the learned Judge after some comments which their Lordships do not feel called on to examine, says "a subsequent Statute, which expressly revived a prior Statute inconsistent with the Advertisements of Elizabeth, would by necessary implication repeal them." (Appendix, p. 79.)

The Committee is unable to accept this interpretation of the Advertisements and the Visitation Articles as the true one. Their Lordships think that the defacing, and destroying, and converting to profane and other uses, of all the vestments now in question, as described in the Lincoln MS. published by Mr. Peacock, show a determination to remove utterly these ornaments, and not to leave them to be used hereafter when higher Ritual might become possible. They think that the inquiries of Sandys and Aylmer, already quoted, show that the surplice was not to be the least or lowest, but the only vestment of the parochial clergy. They think that the Articles of Visitation (cited Ritual Commission, Report 2), issued at and after the passing of the Act of Uniformity, which ask after the "fair surplice for the minister to wear at all times of his ministration," without any suggestion of any other vestment, could scarcely have been put forth by Bishops desirous of a more elaborate Ritual and aware that the vestments were now of statutable obligation. They think that in prescribing the surplice only, the Advertisements meant what they said, the surplice only; and that strong steps were taken to insure that only the surplice should be used.

Their Lordships remark further that the doctrine of a minimum of ritual represented by the surplice, with a maximum represented by a return to the mediæval vestments is inconsistent with the fact that the Rubric is a positive order, under a penal Statute, accepted by each clergyman in a remarkably strong expression of "assent and consent" and capable of being enforced with severe penalties. It is not to be assumed without proof that such a Statute was framed so as to leave a choice between contrary interpretations, in a question that had ever been regarded as momentous, and had stirred, as the learned Judge remarks, some of the strongest passions of man. Historically all the communications between Archbishop Parker and the Queen and her Government indicate a strong desire for uniformity, and the Articles of Visitation after 1662 were all framed with the like object. If the minister is ordered to wear a surplice at all times of his ministration, he cannot wear an alb and tunicle when assisting at the Holy Communion; if he is to celebrate the Holy Communion in a chasuble, he cannot celebrate in a surplice.

In order to decide the question before the Committee, it seems desirable first to examine the effect of the Church legislation of 1603-4. The 14th Canon orders the use of the Prayer Book without omission or innovation, and the 80th Canon directs that copies of the Prayer Book are to be provided, in its lately revised form, and, by implication, the Ornaments-Rubric is thus made binding on the clergy. Canon 24th directs the use of the cope in Cathedral and Collegiate Churches upon principal feast days, "according to the Advertisements for this end, [*for* for this end *read* published] anno 7 Elizabeth." Canon 58th says that "every Minister saying the public prayers, or ministering the Sacraments or other rites of the Church, shall wear a decent and comely surplice with sleeves, to be provided at the charge of the parish." There can be no doubt that the intention here was not to set up a contradictory rule, by prescribing vestments in the Prayer Book and a surplice in the Canons which give authority to the Prayer Book. It could

not be intended, in recognizing the legal force of the Advertisements, to bring back the things which the Advertisements had taken away, nor could it be expected that either the Minister or people should provide vestments in lieu of those which had been destroyed, and accordingly no direction is given with regard to them. The provisions of the Canons and Prayer Book must be read together, as far as possible, and the Canons upon the vesture of the ministers must be held to be an exposition of and limitation of the Rubric of Ornaments. Such ornaments are to be used as were in use in the Second year of Edward VI., limited as to the vestments by the special provisions of the Canons themselves; and the contemporaneous exposition of universal practice show that this was regarded as the meaning of the Canons. There does not appear to have been any return to the vestments in any quarter whatever.

The Act of 1662 sanctioned a Prayer Book with a different Rubric, but it referred back to the Second of Edward VI., and in some sense or other revived the Rubric of King Edward's First Book; the question is in what sense and in what degree. There seem to be three opinions on this point.

One, that the Act of 1662 repealed all legislation on the subject of the ornaments of the Minister; the second, that the Act and the Canons set up two distinct standards of ritual on this subject; and the third, that the Act of 1662 is to be read with the Canons of 1602 [*read* 1603-4] still in force, and harmonized with them.

I. The first is that expressed by Dr. Lushington, in the case of *Westerton* v. *Liddell*, that in reviving the Rubric of 1549 the Act of 1662 excluded and repealed all provisions whatever of Act of Parliament or Canon which had been made after 1549 and prior to 1662. This view was adopted by Sir John Dodson in the same case, when it reached the Arches Court. The consequence of this must be that every celebration of the Holy Communion in a surplice only, from 1662 to the present day, would be a violation of the Statute. The Canons of 1603-4 being repealed as to this matter, together with the Advertisements on which the Canons built, there would be no legal warrant for using the surplice and omitting to use the vestments at the Holy Communion. Yet there is no doubt of the practice. For 180 years the vestment was never worn. And thus there would be the unusual occurrence of a Statute repealing former legislation and fortified with heavy penalties, which was systematically broken not only by one and all of those who had declared their unfeigned assent and consent to all and everything contained in the Book of Common Prayer, but by the framers of the Rubric themselves immediately after the confirmation of it by Act of Parliament. Nor is there during that time one single instance of calling to account or censuring any one for his particular share in a universal violation of the law. It appears plain to their Lordships from these facts that the idea of the repealing power of this Rubric is a modern one.

But the 24th Clause of the Act of Uniformity shows that it was not the intention of the passers of the Act to repeal past laws. It provides that "the several good Laws and Statutes of this realm which [have formerly been made and *sic*] are now in force, for the uniformity of prayer and the [*dele* the] administration of the Sacraments . . . shall stand in full force and strength, to all intents and purposes what [so *sic*] ever, for the establishing and confirming [of *sic*] the said Book." The laws were to remain; but they were to bear on the new Book of Common Prayer, and not upon any former one. Now, the Prayer Book up to that time in use—

the Book which was the subject of the Hampton Court Conference—rested upon the Canons of 1603-4; and it is hard to suppose that the most obvious "laws" of all, those in force up to that moment, were excluded from the saving power of this 24th Clause. Their Lordships think that the Canons relating to the vestments of the Ministers were not repealed by the Act of Uniformity, and that the Canons had the same force after the passing of that Act which they had before. The contemporary exposition on this point is very strong. Bishop Henchman, of Salisbury, in 1662, in enquiring whether his Churches are provided with the Prayer Book "newly established," enquires for the "comely large and fine surplice," and for no other vestment. The same enquiry for the "comely large surplice, for the minister to wear at all times of his ministration," is found in a great number of Visitation Articles, republished by the Ritual Commission (Report 2, Appendix, p. 606, 614 and following), extending from 1662 to the end of the century. Bishop Fuller, of Lincoln, A.D. 1671, Bishop Gunning, of Ely, A.D. 1679, and Bishop Trimnell, of Norwich, A.D. 1716, refer to the 58th Canon as unrepealed, in the margin of their Visitation Articles upon the surplice. Their Lordships are of opinion that the Canon was not repealed, and that the Ecclesiastical authorities had no suspicion that it had been.

II. The next opinion is, that the Canons and the Act of Uniformity, being irreconcilable, set up distinct standards of Ritual, the one of a more elaborate and the other of a severer type, the one a maximum and the other a minimum, the one represented by the Rubric and other by the 58th Canon. To this view the learned Judge in the Court below appears to incline. Their Lordships, notwithstanding this authority, are obliged to come to the conclusion that this view is at variance with all the facts of the case. They have already observed that the chasuble, alb, and tunicle were swept away with severe exactness in the time of Queen Elizabeth, and that there was no trace of any attempt to revive them. The Act of Uniformity reflects, by the strictness of its provisions, the temper of the framers. The fate of a "proviso as to the dispensation with deprivation, for not using the cross and surplice," which was sent down from the House of Lords to the House of Commons illustrates this. The Commons rejected the proviso (Commons' Journals, VIII, 413), and in the subsequent conference between the two Houses, the Manager, Serjeant Charlton, gave amongst other reasons for rejecting the proviso, "that it would unavoidably establish schism, . . . that he thought it better to impose no ceremonies than to dispense with any; and he thought it very incongruous at the same time when you are settling uniformity to establish schism" (Lords' Journals, vol. xi., p. 449 *a*). And the House of Lords agreed that this proviso should be struck out. (Lords' Journals, vol. xi., pp. 450*a*, 450 *b*.) It cannot be supposed that an Act which applied the principle of uniformity so strictly in one direction was intended on the other to open the door to a return to practices that were suspected as Romish, and this without serious remonstrance in either House from the minority. The purpose of the Act is clear. It was to establish an uniformity upon all parties alike. That is its language, and that is the interpretation it bore with those in authority who had to expound it in visitation articles and the like.

III. The third opinion remains, that the provisions of the Rubric of Edward the Sixth are continued, so far as they are not contrariant to other provisions still in force. And here it is to be observed again that the Rubric was altered, after refusal to listen to the Puritan objections, to a form different from that of any former Rubric, by introducing the word "retained."

Both in the statute of Elizabeth and in the Rubric in question the word "retain" seems to mean that things should remain as they were at the time of the enactment. Chasuble, alb, and tunicle had disappeared for more than sixty years; and it has been argued fairly that this word would not have force to bring back anything that had disappeared more than a generation ago. To retain means, in common parlance, to continue something now in existence. It is reasonable to presume that the alteration was not made without some purpose; and it appears to their Lordships that the words of the Rubric strictly construed, would not suffice to revive ornaments which had been lawfully set aside, although they were in use in the second year of Edward VI. But whether this be so or not, their Lordships are of opinion that as the Canons of 1603-4, which in one part seemed to revive the vestments, and in another, to order the surplice for all ministrations, ought to be construed together, so the Act of Uniformity is to be construed with the two canons on this subject, which it did not repeal, and that the result is that the cope is to be worn in ministering the Holy Communion on high feast days in Cathedrals, and Collegiate Churches, and the surplice in all other ministrations. Their Lordships attach great weight to the abundant evidence which now exists that from the days of Elizabeth to about 1840, the practice is uniformly in accordance with this view; and is irreconcileable with either of the other views. Through the researches that have been referred to in these remarks a clear and abundant *expositio contemporanea* has been supplied which compensates for the scantiness of some other materials for a judgment.

It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute, but contemporaneous and continuous usage is of the greatest efficacy in law for determining the true construction of obscurely framed documents. In the case of the Bristol Charities (2 Jac. and Walker, 321) Lord Eldon observes, "length of time (though it must be admitted that the charity is not barred by it) is a very material consideration when the question is, what is the effect and true construction of the instrument? Is it according to the practice and enjoyment which has obtained for more than two centuries, or has that practice and enjoyment been a breach of trust?" We may ask in like manner what is the true construction of the Act of 1662 and of the Rubric which it sanctioned? Is it according to the practice of two centuries, or was the practice a continual breach of the law, commanded and enforced by the Bishops, including the very Bishops who aided in framing the Act?

The learned Judge relies on two former judgments of this Committee, as having almost determined the question of vestments; one of them in the case of Liddell *v.* Westerton, and the other in the case of Martin *v.* Mackonochie.

In Liddell *v.* Westerton, the question which their Lordships had to decide was whether the Rubric which excluded all use of crosses in the service, affected crosses not used in the service but employed for decoration of the building only, and they determined that these were unaffected by the Rubric.

They decided that the Rubric in question referred to the Act passed in 2 and 3 Edward VI, adopting the first Prayer Book, and not to any canons or injunctions having the authority of Parliament, but adopted at an earlier period. Their Lordships feel quite free to adopt both the positive and the negative conclusions thus arrived at. In construing the expressions made use of in that judgment, it should be borne in mind that this question of the vestments was not before the Court.

In Martin *v.* Mackonochie the Committee stated anew the substance of the judgment in Liddell *v.* Westerton upon this point, but did not propose to take up any new ground.

Their Lordships will advise Her Majesty that the Defendant Mr. Purchas has offended against the Laws Ecclesiastical in wearing the chasuble, alb, and tunicle; and that a monition shall issue against the Defendant accordingly.

With respect to the cap, called a biretta, which the Defendant is said to have carried in his hand, but not to have worn in church, their Lordships would not be justified, upon the evidence before them, in pronouncing that the Defendant did an unlawful act.

As to the holy or consecrated water in the church the evidence does not go to the full extent of the charge. There is no proof whatever that the water placed in the church was consecrated at all, nor that it was put there by the Defendant with the purpose of its being used as the congregation seem to have used it. This is a penal proceeding, and each charge must be strictly proved as alleged. Upon this point, too, the appeal must be disallowed.

Their Lordships now proceed to the 16th Article, which charges that, on a certain day, the Defendant "administered wine mixed with water instead of wine to the communicants at the Lord's Supper." The learned Judge in the Court below has decided that it is illegal to mix water with the wine at the time of the service of Holy Communion; but he decides that water may be mixed with the wine "provided that the mingling be not made at the time of the celebration." For this view the learned Judge quotes, amongst other authorities, Bishop Andrewes, but it has escaped him that the practice of Bishop Andrewes was that which he condemns; in his Consecration Service, the Bishop directs as follows:—*Episcopus de novo in calicem ex poculo quod in sacrâ mensâ stabat, effundit, admistâque aquâ, recitat clare verba illa consecratoria.* (Sparrow's Articles, &c.) The learned Judge considers that the act of mixing has some symbolical meaning, but he holds that it was "wholly unconnected with any papal superstition, or any doctrine which the Church of England has rejected." (Appendix, p. 88.) Nor does it appear that the controversy between the Romish and Reformed churches turned so much upon the symbolism of the mixed cup, as upon the necessity of its use.

Their Lordships find here two questions for their consideration. Since it has been decided by this Committee that additional ceremonies or innovations are excluded by implication by the Service for Holy Communion; or, in other words, that the service for Holy Communion is not only a guide but a sufficient guide in its celebration; and since the learned Judge has decided that the act of mingling wine with water in the Service, with a view to its administration, is one of the additional ceremonies so excluded, the first question is whether the doing the act before the service, and in the vestry or elsewhere, could so alter the symbolical character of the act that the cup might be brought in and consecrated and administered to the people, without constituting an innovation or additional ceremonial act, beyond what is ordered in the service.

If this question be decided in the affirmative, the second question would be whether upon a fair construction of the directions of the Rubrics, this previous mingling could take place without violation of the Rubrics.

The first question is, whether this is an additional ceremony, not provided

in the Rubric? the second question is, whether it is contrary to the express directions of the Rubric?

On the former question their Lordships observe that, whether the water mingled with the wine be used because Christ himself is believed to have used it, or in order to symbolize the water from the rock given to the thirsty Israelites, or the blood and water from the side of the Lord, or the union of Christ with His people (the water being a type of the people), or the union of two natures in the one Lord, it can scarcely be said that the reception of the mingled chalice had no share in this symbolism, but only the act of mingling. Their Lordships are unable to arrive at the conclusion that, if the mingling and administering in the service water and wine is an additional ceremony, and so unlawful, it becomes lawful by removing from the service the act of mingling but keeping the mingled cup itself and administering it. But neither Eastern nor Western Church, so far as the Committee is aware, has any custom of mixing the water with wine apart from and before the service.

As to the second question, the addition of water is prescribed in the Prayer Book of 1549; it has disappeared from all the later books, and this omission must have been designed. The Rubric of 1662, following that of 1604, says "The bread and wine for the Communion shall be provided by the Curate and [the *sic*] Churchwardens at the charges of the parish." So far wine, not mixed with water, must be intended. The priest is directed in the Rubric before the Prayer for the Church Militant to place on the table "so much bread and wine as he shall think sufficient." Of so much of this wine as may remain unconsecrated it is said that "the Curate shall have it to his own use." These directions make it appear that the wine has not been mingled with water, but remains the same throughout. If the wine had been mingled with water before being placed on the table, then the portion of it that might revert to the curate would have undergone this symbolical mixing; which cannot surely have been intended.

Their Lordships gladly leave these niceties of examination, to observe that they doubt whether this part of the article is of much importance. As the learned Judge has decided that the act of mingling the water with the wine in the service is illegal, the private mingling of the wine is not likely to find favour with any. Whilst the former practice has prevailed both in the East and the West, and is of great antiquity, the latter practice has not prevailed at all; and it would be a manifest deviation from the Rubric of the Prayer Book of Edward VI as well as from the exceptional practice and directions of Bishop Andrewes. Upon this 16th Article, however, whether it be more or less important, their Lordships allow the Appeal, and will advise that a monition should issue against the Defendant.

The 20th Article charges the Defendant with using on divers occasions "wafer bread, being bread made in the special shape and fashion of circular wafers, instead of bread such as is usual to be eaten," and with administering the same to the communicants. The Rubric of the Prayer Book now in force runs thus: — "And to take away all occasion of dissension and superstition which any person hath or might have concerning the bread and wine, it shall suffice that the bread be such as is usual to be eaten, but the best and purest wheat bread that conveniently may be gotten." This is the same with the Rubric of 1552, 1559, and 1604, with two exceptions. The present Rubric omits after "eaten" the words "at the table with other meats," and it introduces words which have been prominent in the argu-

ment in this case; instead of "to take away the superstition," it reads "to take away all occasion of dissension and superstition." In the first book of Edward VI the direction is different: "For avoiding [of *sic*] all matter and occasion of dissension, it is meet that the bread prepared for the Communion be made, through all this realm, after one sort or [*for* or *read* and] fashion, that is to say, unleavened and round, as it was afore, but without all manner of print, and something more larger and thicker than it was, so that it may be aptly divided into [*for* into *read* in] divers pieces, and every one shall be divided in two pieces at the least, or more by the discretion of the minister, and so distributed." One of the Elizabethan injunctions is at variance with the Elizabethan Rubric, continued from the 2nd book of King Edward, and provides as follows:—"Where also it was in the time of King Edward VI used to have the sacramental bread of common fine bread, it is ordered for the more reverence to be given to the [*for* the *read* these] holy mysteries, being the Sacraments of the body and blood of our Saviour Jesus Christ, that this [*for* this *read* the] same sacramental bread be made and formed plain, without any figure thereupon, of the same fineness and fashion, [*dele* ,] round though somewhat bigger in compass and thickness, as the usual bread and wafer [*insert* ,] heretofore named singing-cakes, which served for the use of the private masses [*for* masses *read* mass]." (Cardwell.) The learned Judge calls this injunction a *contemporanea expositio* of the Rubric, but it is in fact a superseding of the Rubric, nor can it be regarded as at all reconcileable with it. Upon these facts the learned Judge decides as follows: — "It appears, therefore, that while the first Rubric prescribed a uniformity of size and material, the later and the present Rubric are contented with the order that the purest wheaten flour shall suffice, and the bread may be leavened according to the use of the Eastern, or unleavened according to the use of the Western Church."

Their Lordships do not find any mention of flour, and apart from this slight inadvertence, their Lordships are unable to accept this view of the passages that have been quoted. The first Book of Edward has in view uniformity of practice, and not the choice of two practices; the bread is to be made "through all this realm after the same sort and fashion." The 2nd Book of Edward VI. is not so positive in form, for the words "it shall suffice" are used; but it produced uniformity and not diversity, for the Injunction of 1559 says, "it was in the time of King Edward the Sixth, used to have the Sacramental bread of common fine bread." This general use the Injunction proposes to change; but again the order is universal and binds the very minutest details; the bread is to be plain without any figure, fashioned round but somewhat bigger in compass and thickness than the cakes used in private masses: there is no trace of an intention to leave men free to follow the fashion of the Eastern or of the Western Church. So there are three distinct orders, first, for wafer bread, unleavened as before, but larger and without print; then for common bread usual at the table; then for a new kind of bread thicker than the wafer and without symbolical figures; and the first and last are in their form universal and absolute; and the second also had brought about a general usage and not a diversity. There was, no doubt, a great division of opinion upon this question; and this makes it all the more remarkable, that none of the three orders takes the natural course of leaving the matter free. Each seems to have aimed at uniformity but each in a different practice.

But it has been argued by some that the phrase "it shall suffice" implies

a permission; that the words may mean "it shall be sufficient, but another usage is allowed and might even be better." On the other hand, it has been argued, that in other places in the Liturgy "it shall suffice" must be construed into a positive direction; that if "it shall suffice" to pour water on a sickly child, this ought to restrain the clergyman from immersing a child known to be sickly; that even the weaker form "it may suffice" in the Rubric as to children and infants, brought to be baptized, conveys to the minister a distinct direction as to what he is to do, and leaves no alternative course apparent; that "it shall suffice that the Litany be once read" [*for* read *put* said] for both deacons and priests is meant to be, and is received as a positive order; and that in such cases "it shall suffice" means "it shall be sufficient for the completeness of a sacrament or for the observance by the minister of the Rubric." Their Lordships are disposed to construe this phrase in each case according to the context. Here the expression is "to do [*for* do *read* take] away all occasion of dissension and superstition . . . it shall suffice." If these words left the whole matter open, and only provided that the usual bread should be sufficient where it happened to be used, it is difficult to see how either dissension or superstition would be taken away: not dissension, for there would be a license that had not existed since the Reformation; not superstition, for the old wafer with its "print," its "figures," which the first Book of Edward and the injunctions desired might be excluded, might now be used if this Rubric were the only restraint. Their Lordships are therefore inclined to think on this ground alone that the Rubric contains a positive direction to employ at the Holy Communion the usual bread.

It is at least worthy of notice that when Cosin and others at the last revision desired to insert the words making the wafer also lawful, these words were rejected.

But their Lordships attach greater weight to the exposition of this rubric furnished by the history of the question. From a large collection of Visitation Articles, from the time of Charles II it is clear that the best and purest wheat bread was to be provided for the Holy Communion, and no other kind of bread. They believe that from that time till about 1840 the practice of using the usual wheat bread was universal.

The words of the 20th Canon, to which the Visitation Articles refer, point the same way. The churchwardens are bound to supply "wheaten bread," and this alone is mentioned. If wafer bread is equally permitted, or the special cakes of Edward VI's first Book and of the injunctions, it is hard to see why the parish is to supply wheaten bread, in cases where wafers are to be supplied by the minister or from some other source. And if wafers were to be in use, a general injunction to all churchwardens to supply wheaten bread, would be quite inapplicable to all churches where there should be another usage.

Upon the whole their Lordships think that the law of the Church has directed the use of pure wheat bread, and they must so advise Her Majesty.

It remains to consider part of the 17th Article of charge, which sets out that the Respondent during the whole of the prayer of consecration at the Holy Communion "stood at the middle of that side of the holy table which if the said holy table stood at the east end of the said church or chapel (the said table in St. James's Chapel, in fact, standing at the west end thereof), would be the west side of such table, in such wise that you then stood between the people and the said holy Table, with your back to the people,

so that the people could not see you break the bread or take the cup into your hand." The learned Judge deals with this charge very briefly, believing it to have been settled by this Committee in the Judgment in Martin *v.* Mackonochie. He says, "I must observe that the Rubric does not require that the people should see the breaking of the bread, or the taking of the cup into the priest's hands; and, if it did so prescribe, the evidence in this case would establish that all the congregation could see him take the cup into his hand, and some of them at least could see him break the bread." The Rubric on this point is this: "When the priest, standing before the table, hath so ordered the bread and wine that he may with the more readiness and decency break the bread before the people, and take the cup into his hands, he shall say the Prayer of Consecration, as followeth." Their Lordships are of opinion that these words mean that the priest is so to stand that the people present may see him break the bread and take the cup into his hands; although the learned Judge is right if he means to say that the mere words do not speak of seeing.

Their Lordships think that the evidence of the witness Verrall, which there is no reason to doubt, proves that "generally the congregation could not see" the breaking of the bread, because the Respondent had his back turned to them. As regards the cup, the witness said that they could see him take the cup into his hand, but being asked further, he says, "I could tell he was taking the cup into his hand." This is consistently explained by supposing that the witness and others could see a certain motion of the Respondent which from their knowledge of the service and from the subsequent elevation they were sure was the taking of the cup into his hands. It would probably be impossible in any position so to act that all the congregation could see or that all should be unable to see; but we take it as proved that the greater part of the congregation could not see the breaking of the bread or the act of taking the cup into the hands.

The facts being established, their Lordships proceed to consider the question itself. In default of argument on the Respondent's side, they have been somewhat aided by a large mass of controversial literature, which shows how much interest this question excites, and which has probably left few of the facts unnoticed.

The Rubric upon the position of the table directs that it shall "stand in the body of the church or in the chancel, where morning and evening prayer are appointed to be said." This is the same as the Rubric of 1552, 1559, and 1604, excepting the verbal alteration of *are* for *be*. It goes on, "And the priest standing at the north side of the table, shall say the Lord's Prayer with the Collect following." The table is a moveable table. By the injunctions of Queen Elizabeth (Cardwell, Doc. Annals I. p. 210) it is ordered "that the holy table in every church be decently made and set in the place where the altar stood, and there commonly covered as thereto belongeth, and as shall be appointed by the visitors, and so to stand, saving when the Communion of the Sacrament is to be distributed; at which time the same shall be so placed in good sort within the chancel, as whereby the minister may be more conveniently heard of the communicants in his prayer and ministrations [*dele* s], and the communicants also more conveniently and in more number communicate with the said minister. And after the Communion is [*dele* is], done from time to time, the same holy table to be placed where it stood before." If this custom still prevailed of bringing the table from the east and placing it in the chancel, the two Rubrics would present no difficulty.

The priest standing on [*read* at] the north side as directed by the one, would also be standing before the table so as to break the bread before the people, and take the cup into his hand as required by the other. No direction was given for a change of position in the Prayer of Consecration in the second book of King Edward VI., but only a change of posture in the words "standing up." But before the time of the Revision of 1662, the custom of placing the table along the east wall was becoming general, and it may fairly be said that the revisers must have had this in view.

The following questions appear to require an answer, in order to dispose of this part of the case; what is meant by "the north side of the table?" What change, if any, is ordered by the Rubric before the Prayer of Consecration? And what is the meaning of "before the people" in that Rubric?

As to the first question, their Lordships are of opinion that "north side of the table" means that side which looks towards the north.

They have considered some ingenious arguments intended to prove that "north side" means that part of the west side that is nearest to the north. One of these is that the middle of the altar before the Reformation was occupied by a stone or slab, called *mensa consecratoria* and *sigillum altaris*, that the part of the altar north of this was called north side, and that to the south of it was called the south side. Without inquiring whether English altars were generally so constructed, which is to say the least doubtful, their Lordships observe that in the directions for the substitution of a moveable table for the altar and for its decent covering, and its position at various times, there is no hint that this is to revive this peculiarity of the altar which it replaced; and they do not believe that the table was so arranged or divided.

Another argument is drawn from the Jewish Ritual. On offering sacrifices before the Lord, the altar was to be sprinkled with the blood, and a red line was drawn across the altar to mark the height at which it should be sprinkled; and it is argued that the line being only in front, the Priest must have stood in front in order to see it and be guided by it. But on the other hand the line probably went all round the altar, and the sprinkling was applied to all the sides. And even if the fact was rightly stated, it would be impossible to allow an argument so remote and shadowy to supersede the plain sense of a direction so clear in itself. When the table was placed in the body of the church or chancel, the Priest or Minister was to stand on the north side of it, looking south.

When it became the custom to place the table altarwise against the east wall, the Rubric remained the same. And there are many authorities to show that the position of the Minister was still upon the north side or end, facing south. It is only necessary to cite a few. Archdeacon Pory (1662), in his Visitation Articles, says, "The Minister standing, as he is appointed, at the north side or end of the table when he celebrates [*for* he celebrates *read* he prepares to celebrate] the Holy Communion." In the dispute between the Vicar of Grantham and his parishioners (1627), Bishop Williams plainly shows that whichever way the table was to stand, which was the matter in dispute, the position of the Minister was on the north. "If you mean by altarwise that the table shall stand along close by the wall, so that you be forced to officiate at one end thereof (as you may have observed in great men's Chapels), I do not believe that ever the Communion Tables were otherwise than by casualty so placed in country churches." He also

says, "I conceive the alteration was made in the Rubric to show which way the celebrant was to face." (Heylin, "Coale from the Altar," and Williams, "Holy Table.") Heylin says, quoting the Latin Prayer Book of 1560, "I presume that no man of reason can deny but that the northern end or side, call it which you will, is *pars septentrionalis*, the northen part." ("Coale from the Altar.") When Bishop Wren was impeached in the House of Lords, A.D. 1636 [*read* 1641], for consecrating the elements on the west side of the table, he answered that he stood on the north side at all the rest of the service except at the Prayer of Consecration. "He humbly conceiveth it is a plain demonstration that he came to the west side only for the more conveniency of executing his office, and no way at all in any superstition, much less in any imitation of the Romish priests, for they place themselves there at all the service before and at all after, with no less strictness than at the time of consecrating the bread and wine." Nicholls (Commentary on Common Prayer, published 1710), Bennett (Annotations on Book of Common Prayer, 1708), Wheatley (Rational Illustrations of Common Prayer, 1710), confirm the view that when the table was placed east and west, the Minister's position was still on the north.

Their Lordships entertain no doubt whatever that when the table was set at the east end the direction to stand at the north side was understood to apply to the north end, and that this was the practice of the church.

It will be convenient to consider next what is the meaning of the words "before the people," in the Rubric, before the Consecration Prayer. Nicholls (*Op. cit.*) observes—"To say the Consecration Prayer (in the recital of which the bread is broken) standing before the table, is not to break the bread before the people; for then the people cannot have a view thereof, which our wise Reformers, upon very good reasoning, ordered that they should." That stress was laid on this witness of the people of the act of breaking, appears by other passages; for example, Udall says—"We press the action of breaking the bread against the Papist. To what end, if not that the beholders might thereby be led unto the breaking of the Body of Christ." (Communion Comeliness, 1641.) Wheatley (*Op. cit.*) says—"Whilst the priest is ordering the bread and wine he is to stand before the table; but when he says the Prayer he is to stand so that he may with more readiness and decency break the bread before the people, which must be on the north side. For if he stood before the table, his body would hinder the people from seeing, so that he must not stand there, and, consequently, he must stand on the north side, there being, in our present Rubric, no other place for the performance of any part of this office."

Their Lordships consider that the Defendant, in standing with his back to the people, disobeyed the Rubric in preventing the people from seeing the breaking of the bread.

The north side being the proper place for the minister throughout the Communion office, and also whilst he is saying the Prayer of Consecration, the question remains, whether the words "standing before the table" direct any temporary change of position in the minister before saying the Prayer of Consecration? This is not the most important, but it is the most difficult question. One opinion is that of Wheatley, quoted above, that the Rubric sends the priest to the west side of the table to order the elements, and recalls him for the Prayer itself. This, however, would be needless if the elements were so placed on the table as that the priest could, "with readiness and decency," order them from the north side, as is often done.

It would also be needless in any case where the Communion Table was placed in the body of the church or in the chancel with its ends east and west. And though this position is not likely now to be adopted, the question is whether that was the law at the time this Rubric was drawn. Now the Rubric prescribes that the Table shall stand "in the body of the church or in the chancel where morning and evening Prayers [*dele* s] are appointed to be said;" and there are two cases, which occurred in 1633, those of Crayford (Cardwell, Doc. Annals, ii. 226] and St. Gregory's London (Ibid, ii. 237) which show that the Table, though placed at the east end, might be moved for convenience' sake and under competent authority. This, too, is the view of Bishop Wren in 1636 (Ibid, ii. 252) "That the Communion Table in every church do always stand close under the east wall of the chancel, the ends thereof north and south, unless the Ordinary give particular directions [*dele* s] otherwise." Should the Table be placed with it ends east and west, it would be absurd to enforce a rule that the priest should go to the west end to order the elements, seeing the north side would be in every way more convenient.

Upon these facts their Lordships incline to think that the Rubric was purposely framed so as not to direct or insist on a change of position in the minister, which might be needless; though it does direct a change of posture from kneeling to standing. The words are intended to set the minister free for the moment from the general direction to stand at the north side, for the special purpose of ordering the elements; but whether for this purpose he would have to change the side or not is not determined, as it would depend on the position of the Table in the church or chancel, and on the position in which the elements were placed on the Table at first. They think that the main object of this part of the Rubric is the ordering of the elements; and that the words "before the Table" do not necessarily mean "between the Table and the people," and are not intended to limit to any side.

The learned Judge in the Court below, in considering the charge against the Defendant that he stood with his back to the people during the Prayer of Consecration, briefly observes "the question appears to me to have been settled by the Privy Council in the case of Martin *v.* Mackonochie." The question before their Lordships in that case was as to the posture and not as to the position of the Minister. The words of the Judgment are: "Their Lordships entertain no doubt on the construction of this Rubric" [*i. e.*, before the Prayer of Consecration] "that the Priest is intended to continue in one posture during the Prayer, and not to change from standing to kneeling, or *vice versâ;* and it appears to them equally certain that the Priest is intended to stand and not to kneel. They think that the words 'standing before the table' apply to the whole sentence; and they think this is made more apparent by the consideration that acts are to be done by the Priest before the people as the prayer proceeds (such as taking the paten and chalice into his hands, breaking the bread, and laying his hand on the various vessels) which could only be done in the attitude of standing."

This passage refers to posture or attitude from beginning to end, and not to position with reference to the sides of the table. And it could not be construed to justify Mr. Purchas in standing with his back to the people, unless a material addition were made to it. The learned Judge reads it as if it ran, "They think that the words standing before the table apply to the whole sentence, *and that before the table means between the table and the people on the west side.*" But these last words are mere assumption. The

question of position was not before their Lordships; if it had been, no doubt the passage would have been conceived differently, and the question of position expressly settled.

Upon the whole, then, their Lordships think that the words of Archdeacon, afterwards Bishop, Cosin in A.D, 1627 express the state of the Law, "Doth he [the minister] stand at the north side of the table, and perform all things there, but when he hath special cause to remove from it, as in reading and preaching upon the Gospel, or in delivering the Sacrament to the communicants, or other occasions of the like nature." (Bishop Cosin's Correspondence. Part I. p. 106. Surtees Society.) They think that the Prayer of Consecration is to be used at the north side of the table, so that the minister looks south, whether a broader or a narrower side of the table be towards the north.

It is mentioned that Mr. Purchas' chapel does not stand in the usual position, and that, in fact, he occupied the east side when he stood with his back towards the people. If it had happened, as it does in one of the Chapels Royal, that the north side had been where the west side usually is, a question betweeen the letter and the spirit of the Rubrics would have arisen. But the Defendant seems us to have departed, both from the letter and the spirit of the Rubrics; and our advice to Her Majesty will be that a monition should issue to him as to this charge also.

As all the charges have been proved against the Defendant except as to two less important particulars, we direct that he shall pay the costs in this Court and in the Court below.

In the following case the Judicial Committee of the Privy Council was abnormally constituted under a particular method of proceeding, (vid. sup. Ch. VI., p. 51), consequently a spiritual person sat upon the tribunal.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Martin v. *Mackonochie, from the Court of Arches, delivered on the 23rd December*, 1868.

Present at the hearing: Lord Chancellor [Cairns]; Archbishop of York [Thomson]; Lord Chelmsford; Lord Westbury; Sir William Erle; Sir James W. Colvile.

The case of Martin *v.* Mackonochie, commenced before the Bishop of London, was, under the provisions of the Clergy Discipline Act, sent by the Bishop to the Court of the Archbishop of Canterbury for trial in the first instance; and having been fully heard before the Judge of the Arches Court, resulted in a decree made on the 28th of March, 1868.

Mr. Mackonochie, the clerk in Holy Orders against whom these proceedings were directed, was charged with four offences against the laws ecclesiastical, viz.—

1. The elevation during or after the Prayer of Consecration in the Order of the Administration of the Holy Communion of the paten and cup; and the kneeling or prostrating himself before the consecrated elements;

2. Using lighted candles on the Communion-table during the celebration of the Holy Communion, when such candles were not wanted for the purpose of giving light;

3. Using incense in the celebration of the Holy Communion;

4. Mixing water with the wine used in the administration of the Holy Communion.

The learned Judge of the Arches Court by his Decree sustained the 3rd and 4th of these charges, and admonished Mr. Mackonochie to abstain for the future from the use of incense, and from mixing water with the wine as pleaded in the Articles. Against this part of the decree there is no Appeal.

The 2nd charge as to lights was not sustained, the learned Judge holding that it was lawful to place two lighted candles on the Communion-table during the time of the Holy Communion. Against this the promoter has appealed.

As to the 1st charge, Mr. Mackonochie, while admitting the elevation of the consecrated elements at the times and in the manner alleged, pleaded that he had discontinued the practice before the institution of the suit. The learned Judge therefore admonished Mr. Mackonochie not to recur to the practice; but as to the other part of the charge, namely, the kneeling and prostrating himself before the consecrated elements, the learned Judge held that if Mr. Mackonochie had committed any error in that respect, it was one which should not form the subject of a criminal prosecution, but should be referred to the Bishop, in order that he might exercise his discretion thereon.

The promoter appeals from the latter part of the decision of the learned Judge on this charge, and he also complains in his appeal that the defendant was not ordered to pay the costs of the suit.

The questions thus raised by the Appeal were very fully and ably argued before this tribunal, and their Lordships have now to state their reasons for the advice which they propose humbly to offer to Her Majesty.

They will advert first to the charge of kneeling before the consecrated elements.

It is necessary to refer to the whole of the charge on this head as contained in the 3rd and 4th Articles, although some of the acts charged are said to have been discontinued before the suit commenced.

These Articles run thus:—

"Third. That the said Alexander Heriot Mackonochie has in his said church, and within two years last past (to wit, on Sunday, the 23rd day of December, on Christmas Day last past, and on Sunday, the 30th day of December, all in the year of our Lord 1866), during the prayer of consecration in the Order of the Administration of the Holy Communion, elevated the paten above his head, and permitted and sanctioned such elevation; and taken into his hands the cup, and elevated it above his head during the prayer of consecration aforesaid, and permitted and sanctioned the cup to be so taken and elevated; and knelt or prostrated himself before the consecrated elements during the prayer of consecration, and permitted and sanctioned such kneeling or prostrating by other clerks in Holy Orders.

"Fourth. That such elevation of the paten, and such taking and elevation of the cup, and such kneeling and prostrating, are severally unlawful additions to and variations from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer, and Administration of the Sacraments, and other rites and ceremonies of the Church, and are contrary to the said statutes, and to the 14th, 36th, and 38th of the said consitutions and canons, and also to an Act of Parliament passed in a Session of Parliament holden in the thirteenth year of Queen Elizabeth, chapter 12, and to the 25th and 28th of the Articles of Religion therein referred to."

Mr. Mackonochie's answer to these Articles is as follows:—

"Third. Whereas in the 3rd Article given in and admitted as amended in this cause, it is pleaded that the said Alexander Heriot Mackonochie has, to wit—on Sunday, the

23rd day of December, on Christmas Day last past, on Sunday, the 30th day of December, all in the year 1866, during the prayer of consecration in the Order of the Administration of the Holy Communion, elevated the paten above his head, and permitted and sanctioned such elevation, and taken into his hands the cup and elevated it above his head during the prayer of consecration aforesaid, and permitted and sanctioned the cup so to be taken and elevated, and knelt or prostrated himself before the consecrated elements during the prayer of consecration, and permitted and sanctioned such kneeling or prostration by other clerks in Holy Orders. Now the same is in part untruly pleaded, for the party proponent alleges that whilst he admits that the said Alexander Heriot Mackonochie did, on the said two Sundays and on Christmas Day, during the prayer of consecration kneel and sanction kneeling by other clerks before the Lord's Table, he denies that his said party did on the said two Sundays, and on the said Christmas Day, kneel or prostrate himself before the consecrated elements, or permit and sanction such kneeling or prostration by other clerks in Holy Orders, as in the 3rd Article pleaded. And he further alleges, that whilst he admits that he did, on the said two Sundays and Christmas Day, in the said 3rd Article mentioned, elevate and sanction the elevation, by other clerks, of the paten and cup above his head, as is in the said 3rd Article pleaded; yet that such elevation of the paten and cup has been wholly discontinued by the said Alexander Heriot Mackonochie during the Administration of the Holy Communion ever since the said 30th day of December, 1866, and long prior to the institution of this suit. That such practice was discontinued in consequence of legal advice, and in compliance with the expressed wish of the Lord Bishop of the diocese of London, and with a resolution of Convocation, as was well known to the promoter of this suit before he instituted the same."

Before turning to the evidence in support of this charge, it will be proper to consider a preliminary objection which was taken to the Articles, and to the letters of request and citation by which they were preceded.

It was said that although the Articles alleged that the respondent "knelt or prostrated himself before the consecrated elements during the prayer of consecration," the letters of request and citation were for "*bowing*, kneeling, or prostrating himself before the consecrated element during or *after* the prayer of consecration." It was contended that the citation showed no offence, for it might be taken, as in an indictment, in the sense most favourable to the accused, and as affirming nothing more than that he bowed after the prayer of consecration, which, it was said, would or might be innocent. And the Articles, it was argued, by omitting this alternative, were a departure from the citation.

To this it might be sufficient to reply that the objection taken to this citation—a citation, which it is not disputed, does contain other charges cognizable by the Ecclesiastical Court—is an objection of a strictly technical character, and one which would be waived by the appearance of the respondent as he did appear, without protest, and by praying for Articles. But passing from this, it is to be observed that the supposed analogy between the citation and an indictment, on which this objection is founded, entirely fails. The Act of Uniformity, 1 Eliz., cap. 2, contemplates two modes of procedure for enforcing its provisions; one by indictment, under section 4, and the other by process for admonition before the Ordinary, under section 23; and it is under the latter and not the former section that the present proceedings are taken. Moreover, in the case of an indictment followed by judgment, the indictment and judgment become the record, and the judgment is read with reference to the indictment; and if the indictment is open to a construction which is innocent, and would not sustain a judgment, the judgment would be vicious, and must be arrested; whereas the citation is followed by Articles, which in turn are met by a plea; and the Court, after hearing evidence,

defines by its sentence how much of the charge it considers to be relevant, and to have been proved, and thereby corrects any excess of averment in the citation.

The preliminary objection, therefore, on this charge their Lordships feel themselves obliged to repel.

It is necessary now to examine the evidence adduced in support of the charge; and in doing this, and in considering the character of the charge itself their Lordships will confine their attention to the conduct and acts of the respondent as the celebrating or consecrating minister. The allegations and proof as to "sanctioning and permitting other clerks" are so vague that no weight could be, and in the argument little weight was attempted to be, given to them.

The chief witness in support of the charge is Mr. Beames. He has not been cross-examined, and no evidence has been adduced for the respondent. The statement of Mr. Beames may therefore be taken to be uncontroverted. He speaks of the 23rd and 25th of December, 1866. On both of these occasions the respondent was the celebrant at the Communion Service. The effect of the answers of Mr. Beames may be stated to be that the respondent commenced to read the prayer of consecration standing; that on reaching the words "the same night that He was betrayed," he elevated the paten above his head, returned it to its place on the Communion-table, and then knelt on his knees towards the table, inclining or prostrating his head towards the ground; that he then rose and resumed the prayer; that when, in the further course of the prayer, he took the chalice, he elevated it above his head as he had done the paten, replaced it on the Communion-table, and knelt or prostrated himself as before.

The elevation of the elements has, as has already said, been discontinued, and as to the kneeling after the consecration of the chalice, it might possibly be suggested that it was a kneeling after finishing the prayer of consecration, and with reference to the next part of the service in which the celebrant becomes himself the recipient. Omitting, therefore, for the present, the elevation and the second kneeling, the evidence remains that the respondent, after commencing the prayer of consecration standing, paused in the middle of the prayer, knelt down, inclining or prostrating his head towards the ground, and then, rising up again, continued the prayer standing.

In order to bring the conduct of the respondent on this head to the test of Ecclesiastical law, it is proper now to turn to the rubric of the Order of the Administration of the Holy Communion.

The Lord's Prayer and the collect, with which the service commences, are to be said by the priest "standing at the north side of the table."

The priest is then to turn to the people and rehearse distinctly all the ten commandments, "the people still kneeling," implying that the priest is still to stand.

This is to be followed by one of the collects for the Sovereign, "the priest standing as before," and by the collect for the day.

The priest is then to read the Epistle and Gospel, and to say the Creed, during which no change of attitude is indicated.

After the sermon, when the priest has returned to the Lord's Table, the sentences of the offertory, the prayer for the Church militant, and the exhortations are to be "said" by the priest, without any direction as to change of posture; and then, at the confession, he, as well as all the people, is directed to kneel.

For the absolution and the sentences which follow the priest is directed to stand up, and to turn himself to the people; for the words "It is very meet," &c., and the "prefaces," he is to turn to the Lord's Table, and he is then to kneel down at the Lord's Table, and, in the name of all the recipients, say the prayer "We do not presume," &c.

The rubric before the prayer of consecration then follows, and is in these words:—

"When the priest, standing before the table, hath so ordered the bread and wine that he may with the more readiness and decency break the bread before the people, and take the cup into his hands, he shall say the prayer of consecration, as follows."

Their Lordships entertain no doubt on the construction of this rubric, that the priest is intended to continue in one posture during the prayer, and not to change from standing to kneeling, or *vice versâ;* and it appears to them equally certain that the priest is intended to stand, and not to kneel. They think that the words "standing before the table" apply to the whole sentence; and they think this is made more apparent by the consideration that acts are to be done by the priest before the people as the prayer proceeds (such as taking the paten and chalice into his hands, breaking the bread, and laying his hand on the various vessels) which could only be done in the attitude of standing.

This being, in their Lordships' opinion, the proper construction of the rubric, it is clear that the respondent, by the posture or change of posture which he has adopted during the prayer, has violated the rubric, and committed an offence within the meaning of the 13 & 14 Car. II., cap. 4, sects. 2, 17, 24, taken in connexion with the 1 Eliz., cap. 2, and punishable by admonition under sect. 23 of the latter statute.

It was contended, on behalf of the respondent, that the act complained of was one of those minute details which could not be taken to be covered by the provisions of the rubric; that the rubric could not be considered as exhaustive in its directions, for no order could be shown in it requiring the celebrating minister to kneel while himself receiving the bread and wine; and that there was no charge or evidence against the respondent that in kneeling after the consecration any adoration of the sacrament was intended.

Their Lordships are of opinion that it is not open to a minister of the Church, or even to their Lordships in advising Her Majesty as the highest Ecclesiastical Tribunal of Appeal, to draw a distinction, in acts which are a departure from or violation of the rubric, between those which are important and those which appear to be trivial. The object of a Statute of Uniformity is, as its preamble expresses, to produce "an universal agreement in the public worship of Almighty God," an object which would be wholly frustrated if each minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, to add to, or to alter any of those details. The rule upon this subject has been already laid down by the Judicial Committee in *Westerton* v. *Liddell,* and their Lordships are disposed entirely to adhere to it: "In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted."

There would, indeed, be no difficulty in showing that the posture of the celebrating minister during all the parts of the Communion Service was, and that for obvious reasons, deemed to be of no small importance in the changes introduced into the Prayer Book at and after the Reformation. The various

stages of the service are, as has already been shown, fenced and guarded by directions of the most exact kind, as to standing and kneeling, the former attitude being prescribed even for prayers, during which a direction to kneel might have been expected. And it is not immaterial to observe, that whereas in the First Prayer Book of King Edward VI. there was contained at the end a rubric in these words:—"As touching kneeling, crossing, holding up of hands, knocking upon the breast, and other gestures, they may be used or left, as every man's devotion serveth, without blame:" this rubric was, in the Second Prayer Book of Edward VI. and in all the subsequent Prayer Books, omitted.

The argument against the completeness of the directions as to posture, derived from a supposed absence of any order that the celebrant shall kneel whilst himself receiving, does not appear to their Lordships to be well founded. In the rubric as to the reception of the sacramental bread and wine, the words "all meekly kneeling" apply, as their Lordships think, to the celebrant, as well as to other clerks, and to the people. And this is made more clear by the rubric termed the Black Rubric, added at the end of the service.

It is true, as was contended, that there is no charge against the respondent, that the kneeling complained of was intended as an act of adoration of the sacramental elements. Such a charge, involving as it would an inquiry into sentiments and feelings of which no tribunal can adequately judge, would be difficult of proof; and the rubrical enactments appear to have been wisely confined to prescribing an order of service free from those outward movements which had become more or less associated with errors in doctrine which, at the Reformation, were renounced. If this order is departed from, it is, as their Lordships think, unnecessary to inquire into the motive by which the departure has been occasioned.

Another argument urged on behalf of the respondent should also be noticed. Mr. James contended with great ability that the charge as to kneeling during the prayer of consecration was made in connexion with the charge as to the elevation of the sacrament, and that the charge of kneeling was only an aggravation of that of elevation, which had been discontinued. This no doubt is so; but the kneeling under the circumstances described, being itself, as their Lordships think it is, a violation of the rubric, they do not think that the judgment of the Court should the less be passed upon it because the other part of the charge, namely, that as to the elevation, is no longer resisted.

It only remains, on this part of the case, to advert to the very learned and elaborate Judgment of the Dean of Arches. That learned Judge states that the rubric does not give precise directions that the celebrant should kneel at the times when it appears that the respondent does kneel; that he is far from saying it is not legally competent to him to adopt this attitude of devotion; and that it cannot be contended that at some time or other he must not kneel during the celebration, although no directions as to his kneeling at all are given by the rubric.

Their Lordships, however, think, as they read the rubric, that directions as to the celebrant kneeling at a particular time of the celebration, namely when he himself receives the sacrament, are given; and that at the time when it appears that the respondent kneels, namely during the prayer of consecration, the directions in the rubric are precise that he should stand and not kneel.

The learned Judge further observes that if Mr. Mackonochie has committed any error in this respect, it is one which should not form the subject of a criminal prosecution, but belongs to the category of cases which should be referred to the Bishop. This category the learned Judge had previously defined to be—

"Things neither ordered nor prohibited expressly or by implication, but the doing or use of which must be governed by the living discretion of some person in authority."

And as to cases in this category, the learned Judge considered that, according to the preface to the Prayer Book, "the parties that doubt or diversely take any thing should always resort to the Bishop of the diocese."

Their Lordships do not think it necessary to consider minutely the cases to which, or the manner in which, this direction in the preface to the Prayer Book is applicable, inasmuch as in their opinion the charge against the respondent, with which they are now dealing, involves what is expressly ordered and prohibited by the rubric, and is therefore a matter in which the Bishop could have no jurisdiction to modify or dispense with the rubrical provisions.

On the whole, their Lordships are of opinion that the charge against the respondent of kneeling during the prayer of consecration has been sustained, and that he should be admonished, not only not to recur to the elevation of the paten and the cup as pleaded in the 3rd Article, but also to abstain for the future from kneeling or prostrating himself before the consecrated elements during the prayer of consecration, as in the same Article also pleaded.

The other charge involved in this Appeal is that of using lighted candles on the Communion-table during the celebration of the Holy Communion, when such candles are not wanted for the purpose of giving light.

This charge is contained in the 5th and 6th Articles, which are as follows:—

"Fifth. That the said Alexander Heriot Mackonochie has in his said church, and within two years last past, to wit, on Sunday, the 23rd day of December, on Christmas Day last past, on Sunday, the 30th day of December, all in the year of our Lord 1866, and on Sunday, the 13th day of January, in the year of our Lord 1867, used lighted candles on the Communion-table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted candles.

"Sixth. That the use of such lighted candles is an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer and Administration of the Sacraments, and other rites and ceremonies of the Church, and is contrary to the said statutes and to the 14th, 36th, and 38th of the said constitutions and canons."

The responsive plea of Mr. Mackonochie, on this head, is as follows:—

"Fifth. Whereas it is pleaded in the fifth Article that the said Alexander Heriot Mackonochie has, in his said church, and within two years last past, to wit, on Sunday, the 23rd day of December, on Christmas Day last past, and on Sunday, the 30th day of December, all in the year of our Lord 1866, and on Sunday, the 13th of January, in the year of our Lord 1867, used lighted candles on the Communion-table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted candles. Now the same is in part untruly pleaded, for the party proponent alleges that on the said three Sundays and Christmas day, in the said fifth Article mentioned, the said lighted candles were not placed on the Communion-table, but on a narrow movable ledge of wood resting on the said Table, and that the said

candles were so placed and kept lighted, not during the celebration of the Holy Communion only, as falsely suggested in the said fifth Article, but also during the whole of the reading of the Communion Service, including the Epistle and Gospel, and during the singing after the reading of the Nicene Creed, and during the delivery of the sermon.

"Sixth. That he denies that the use of such lighted candles is an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer and Administration of the Sacraments, and other rites and ceremonies of the Church, and is contrary to the said statutes, and to the 14th, 36th, and 38th of the said constitutions and canons as in the said sixth Article alleged."

The facts, therefore, on this part of the case, appear to be that the respondent uses two lighted candles during, with reference to, and as an accompaniment of, the Communion Service, and not for the ordinary purpose of giving light, and that these candles are placed on a ledge of wood which is placed on the Communion-table.

The Dean of the Arches seems to have considered that all the practices complained of before him, including this use of lighted candles, were ceremonies. The respondent, in the argument of his counsel at the Bar, appeared to prefer to treat the question as one of ornament, and Mr. James said he considered the lighted candles "part of the symbolical decoration of the altar."

If it were necessary to decide which of these views is correct, their Lordships would feel disposed to agree with the Dean of the Arches, that however candles and candlesticks may *per se* be looked upon as a part of the furniture or ornaments of the church, taking the word ornaments in the larger sense assigned to it by this Committee in *Westerton* v. *Liddell* (Moore, p. 156), yet the lighting of the candles, and the consuming them by burning throughout, and with reference to a service in which they are to act as symbols and illustrations, is itself either a ceremony, or else a ceremonial act forming part of a ceremony, and making the whole ceremony a different one from what it would have been had the lights been omitted.

The Council of Trent (22nd Session, 5th Chapter), De Missæ Ceremoniis et Ritibus, says, "Ceremonias item adhibuit ut mysticas benedictiones, lumina, thymiamata, vestes aliaque multa."

Dr. Donne, also, in his Sermons (p. 80, fol. ed. 1640), writing in support of the use of these lights, calls it a ceremony. He says, "It is in this ceremony of lights as it is in other ceremonies."

There is a clear and obvious distinction between the presence in the Church of things inert and unused, and the active use of the same things as a part of the administration of a sacrament or of a ceremony. Incense, water, a banner, a torch, a candle and candlestick may be parts of the furniture or ornaments of a church; but the censing of persons and things, or, as was said by the Dean of Arches, the bringing in incense at the beginning or during the celebration, and removing it at the close of the celebration of the Eucharist, the symbolical use of water in baptism, or its ceremonial mixing with the sacramental wine; the waving or carrying the banner; the lighting, cremation, and symbolical use of the torch or candle, —these acts give a life and meaning to what is otherwise inexpressive, and the act must be justified, if at all, as a part of a ceremonial law.

If the use of lighted candles in the manner complained of be a ceremony or ceremonial act, it might be sufficient to say that it is not—nor is any ceremony in which it forms a part—among those retained in the Prayer

Book, and it must therefore be included amongst those that are abolished; for the Prayer Book, in the preface, divides all ceremonies into these two classes: those which are retained are specified, whereas none are abolished specifically or by name; but it is assumed that all are abolished which are not expressly retained.

Passing, however, from this, the use of lighted candles, if a ceremonial act or part of a ceremony, would be prohibited by Queen Elizabeth's Act of Uniformity, sec. 4, which is now applicable to the present Prayer Book, and which makes it penal to use any other rite, ceremony, order, form, or manner of celebrating the Lord's Supper . . . . . than is mentioned and set forth in the said Book: and any prior authority for the practice, from usage or otherwise, would be avoided by sec. 27, which enacts that "all laws, statutes, and ordinances, whereby any other service, administration of sacraments, or Common Prayer, is limited, established, or set forth to be used within this realm, shall from henceforth be utterly void and of none effect.

As to the argument that the use complained of is at most only part of a ceremony, their Lordships are of opinion that when a part of a ceremony is changed, the integrity of the ceremony is broken, and it ceases to be the same ceremony.

The learned Judge of the Arches Court was of opinion that these lights were ordered by injunctions having statutable authority, which injunctions had not been directly repealed; that they were primitive and Catholic in their origin, Evangelical in their proper symbolism, purged from all superstition and novelty by the very terms of the injunction which ordered their retention in the church, and that, therefore, it was lawful to place them on the Holy Table during the time of the Holy Communion, "for the signification that Christ is the very true light of the world."

The authorities cited show beyond all doubt the very ancient and general use in the Church of these symbolical lights; and the injunction to which the learned Judge refers, is the third of those issued, A.D. 1547, in the first year of the reign of King Edward VI. By this it was ordered that images should be taken down and destroyed, and that spiritual persons should suffer no torches or candles to be set afore any image or picture, but only two lights upon the high altar, before the Sacrament, which for the signification that Christ is the very true light of the world, they should suffer to remain.

It would deserve consideration how far under any circumstances this injunction could now be held operative, having regard to the words "upon the high altar, before the Sacrament," and to the distinction pointed out by this Committee in Westerton *v.* Liddell (Moore, 176—184), and Parker *v.* Leach (2 Moore, N. S., 199) between the sacrificial altar and the Communion-table. But without dwelling on this, and without stopping at this place to inquire into the nature of the authority under which the injunctions of 1547 were issued, their Lordships are clearly of opinion that the injunction in question, so far as it could be taken to authorize the use of lights as a ceremony or ceremonial act, was abrogated or repealed by the Act 1 Eliz., cap. 2, particularly by section 27 already mentioned, and by the present Prayer Book and Act of Uniformity, and that the use of lighted candles, viewed as a ceremony or ceremonial act, can derive no warrant from that injunction.

Reference was made in the argument for the respondent to a constitution of the Council of Oxford, under Walter, Archbishop of Canterbury, A.D. 1322. That constitution is in these words—"Tempore quo missarum solennia peraguntur, accendentur, duæ candelæ, vel ad minus una;" and is apparently a

repetition of the earlier constitution of A.D. 1222 (Wilkins' Concilia, vol. 1, p. 595):—"Tempore quo missarum solennia peraguntur, accendentur duæ candelæ, vel ad minus una cum lampade." As to these constitutions it is sufficient to say that, in their Lordships' opinion, they must be taken, if of force at the time of passing of any of the Acts of Uniformity, to have been repealed by those Acts.

It remains to be considered whether the use of these two lighted candles can be justified as a question of "ornaments" according to the definition of that term already referred to. It was in this sense that the argument for the respondent appeared to prefer to regard them; and the learned Judge of the Arches Court also, although, at the earlier part of his Judgment, he had stated that the matters complained of before him must be considered as "ceremonies," appears ultimately to have applied to the use of the lighted candles the law or rubric as to ornaments.

The rubric or note as to ornaments, in the commencement of the Prayer Book, is in these words:—

"And here is to be noted that such ornaments of the church, and of the Ministers thereof, at all times of their ministration, shall be retained and be in use as were in this Church of England, by the authority of Parliament, in the second year of the reign of King Edward the VIth."

The construction of this rubric was very fully considered by this Committee in the case of Westerton *v.* Liddell already referred to; and the propositions which their Lordships understand to have been established by the Judgment in that case may thus be stated.

1. The words "Authority of Parliament" in the rubric, refer to and mean the Act of Parliament 2 and 3 Edward VI., cap. 1, giving Parliamentary effect to the First Prayer Book of Edward VI., and do not refer to or mean Canons or Royal injunctions, having the authority of Parliament made at an earlier period.—Moore, p. 160.

2. The term "ornaments" in the rubric means those articles, the use of which, in the services and administrations of the Church, is prescribed by that Prayer Book.—Ibid., p. 156.

3. The term "ornaments" is confined to these articles.—Ibid., p. 156.

4. Though there may be articles not expressly mentioned in the rubric, the use of which would not be restrained, they must be articles which are consistent with, and subsidiary to, the services: as an organ for the singing, a credence-table from which to take the sacramental bread and wine, cushions, hassocks, &c.— Ibid., p. 187.

In these conclusions, and in this construction of the rubric, their Lordships entirely concur, and they go far, in their Lordships' opinion, to decide this part of the case.

The lighted candles are clearly not "ornaments" within the words of the rubric, for they are not prescribed by the authority of Parliament therein mentioned, namely, the First Prayer Book; nor is the injunction of 1547 the authority of Parliament within the meaning of the rubric. They are not subsidiary to the service, for they do not aid or facilitate—much less are they necessary to—the service; nor can a separate and independent ornament, previously in use, be said to be consistent with a rubric which is silent as to it, and which by necessary implication abolishes what it does not retain.

It was strongly pressed by the respondent's counsel that the use of lighted candles up to the time of the issue of the First Prayer Book was clearly legal; that the lighted candles were in use in the Church in the second year

of Edward the VIth; and that there was nothing in the Prayer Book of that year making it unlawful to continue them. All this may be conceded, but it is in reality beside the question. The rubric of our Prayer Book might have said, those ornaments shall be retained which were lawful, or which were in use, in the second year of Edward the VIth, and the argument as to actual use at the time, and as to the weight of the injunction of 1547, might in that case have been material. But the rubric, speaking in 1661, more than 100 years subsequently, has, for reasons which it is not the province of a judicial tribunal to criticize, defined the class of ornaments to be retained by a reference, not to what was in use *de facto*, or to what was lawful in 1549, but to what was in the Church by authority of Parliament in that year; and in the Parliamentary authority which this Committee has held, and which their Lordships hold, to be indicated by these words, the ornaments in question are not found to be included.

Their Lordships have not referred to the usage as to lights during the last 300 years; but they are of opinion that the very general disuse of lights after the Reformation (whatever exceptional cases to the contrary might be produced), contrasted with their normal and prescribed use previously, affords a very strong contemporaneous and continuous exposition of the law upon the subject.

Their Lordships will, therefore, humbly advise Her Majesty that the charge as to lights also has been sustained, and that the respondent should be admonished for the future to abstain from the use of them, as pleaded in these Articles.

All the charges against the respondent having been thus established, their Lordships see no reason why the usual consequence as to costs should not follow; and they advise Her Majesty that the respondent should pay to the appellant the costs in the Court below, and of this Appeal.

In the following case the Judicial Committee of the Privy Council was abnormally constituted under a particular method of proceeding (vid. sup. Ch. VI., p. 51), consequently a spiritual person sat upon the tribunal.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rugg v. *the Bishop of Winchester, from the Court of Arches; delivered on the 23rd December*, 1868.

Present: Lord Chancellor [Cairns]; Archbishop of York [Thomson]; Lord Chelmsford; Lord Westbury; Sir William Erle; Sir James W. Colvile.

The Appellant in this case is the Incumbent of the benefice of Ecchinswell with Sydmonton, in the county of Southampton, and he appeals from a sentence of the Arches Court, pronounced in a cause under the Clergy Discipline Act, by which sentence the Judge declared that the appellant had offended against the Laws Ecclesiastical by not having regularly performed divine service in the church or chapel of St. Mary, Sydmonton, as required by the Lord Bishop of the diocese, and monished him to resume and continue to perform, or to provide for the performance of, public divine service as prescribed in the Book of Common Prayer, in the said church or chapel of St. Mary, Sydmonton, and further condemned him in costs.

It appears that Ecchinswell and Sydmonton were two ancient chapelries belonging to the vicarage of Kingsclere, with a church or chapel in each of the chapelries, each chapelry being also a separate parish for all civil purposes;

and in the year 1852 a proposal or scheme for the union of the two chapelries into a separate parish and benefice, and for their separation from the vicarage of Kingsclere, was set on foot by the Bishop of Winchester, under the provisions of the 1 & 2 Vict., cap. 106, and the 2 & 3 Vict. cap. 43.

This scheme was certified by the Archbishop of Canterbury to the Queen in Council, and all necessary consents having been given, it was ultimately approved of by Her Majesty in Council, and became binding under the Acts referred to.

By this scheme it was provided that the two chapelries of Ecchinswell and Sydmonton should be separated from the vicarage of Kingsclere, and be united so as to form together a separate parish for Ecclesiastical purposes, and a perpetual curacy and benefice, by the name or style of the perpetual curacy of Ecchinswell with Sydmonton. That the proposed separate parish and benefice should be subject to the same Ecclesiastical jurisdiction as the said vicarage of Kingsclere, and the Incumbent of such separate parish and benefice should have exclusive cure of souls within the limits of the same. That two churchwardens should be annually chosen in the customary manner, and at the time when churchwardens are usually appointed, in and for each of the said chapelries; and every person so chosen should be duly admitted, and should do all things pertaining to the office of churchwarden as to Ecclesiastical matters within the said chapelries. That the freehold of the churches and churchyards of Ecchinswell and Sydmonton, so far as the same might be vested in or belong to the Incumbent for the time being of the said vicarage, and also all the glebe-lands of and belonging to the said vicarage situate in the said chapelries of Ecchinswell and Sydmonton, with the appurtenances; and also (except as thereinafter mentioned) all so much and such part of the tithe rentcharges or other payments or compositions for or in lieu of tithes belonging to the said vicarage as arose and accrued, or were payable within or in respect of the said chapelries of Ecchinswell and Sydmonton, should belong and be attached to the said proposed separate benefice of Ecchinswell with Sydmonton for ever, and be held, received, and enjoyed by the Incumbent thereof for the time being, accordingly. That the parishioners of Ecchinswell and Sydmonton should be liable as theretofore to the expenses of repairing and maintaining their respective churches, and the other expenses incidental to the due performance of divine service therein respectively, and should be exempt from all rates, charges, and assessments to be made for or in respect of the church of Kingsclere aforesaid, or for or in respect of any other church or chapel situate elsewhere than within the limits of the said proposed separate parish. That the patronage or right of nomination of or to the said proposed separate benefice of Ecchinswell with Sydmonton should be and remain in the Vicar of the said vicarage and parish church of Kingsclere for the time being and his successors for ever. That the parishioners of Ecchinswell and Sydmonton should be entitled, as theretofore, to accommodation in their said respective churches, but should not henceforth be entitled to any accommodation in the parish church of Kingclere.

It is enacted by the statutes already mentioned, that a scheme thus approved of, and made an Order in Council, shall come into operation forthwith, and be binding on all persons whatsoever, whether the benefice or benefices thereby affected be or be not vacant.

Shortly after the date of the Order in Council, the appellant became the Incumbent of the parish or benefice thus created. The church at Sydmonton was at this time pulled down for the purpose of being rebuilt, and it was rebuilt on the lines of the ancient structure in 1853.

It appears that from the year in which the new church at Sydmonton was opened for divine worship, until 1863, service was performed in the church by the appellant. Some doubt then arose whether the new building required re-consecration; and the appellant, taking advantage of this doubt, closed the church, and refused his consent to its being re-consecrated. To such an extent was his perverse conduct carried, that on the day appointed for the consecration, the 17th August, 1865, he caused the door of the church to be locked, carried away the key, and refused to be present at the ceremony. There can be no justification or excuse for such conduct. If the new church required re-consecration (which, as it was built on the site of the old church, may well be doubted), it was the duty of the appellant to have promoted and assisted such re-consecration. The appellant has since contended that the consecration is invalid, as it took place without his consent, and even against his protest. But their Lordships entertain no doubt that even assuming re-consecration to have been necessary, the appellant, having regard to the site of the building, the purpose for which it was erected, and the provisions of the Order in Council, was not in a position to have refused his assent to the consecration. In the consideration of this case, therefore, the church at Sydmonton must be taken to be a lawfully consecrated church.

On the 5th May, 1867, the appellant gave public notice in the church at Sydmonton that there would be no more service in that church, and for the two following Sundays divine service was not performed in it. Complaint having been made to the Bishop of Winchester, he, on the 23rd May, 1867, by a letter from his Secretary to the appellant, desired to know whether the information he had received was correct, and if so, on what ground he had suspended the service. To this letter the appellant, on the 27th May, 1867, replied in these terms: "In answer to your letter addressed to me at the request of the Bishop of Winchester, I have to inform you, that I have discontinued the service at Sydmonton, and have returned to the two full services in the church at Ecchinswell as performed by me during the first four years of my charge of this parish.

"I think I shall best discharge my duty to my parishioners generally by the return to the two full services (morning and evening) here, and that this will be more strictly in accordance with the requirements of both the Common and Ecclesiastical Law, than having only one service here in order that there may be one in a building which I cannot recognize as ever having been lawfully consecrated, and for the sake merely of one family (not much resident) and their immediate dependents, when the great bulk (more than nine-tenths) of my parishioners live nearer to Ecchinswell church, where they can better and more conveniently attend, than by having to go out of their way a mile or two more distant to Sydmonton House." The following letter, dated the 30th May, 1867, was then written by the Bishop's Secretaries to the appellant:—"We have laid your letter of the 27th before the Bishop of Winchester. We are desired to state that the Bishop requires you to resume the service at Sydmonton church on Sunday next, and to continue the performance of such service in future; and we beg to add that we have forwarded a copy of this letter to the churchwarden, and requested him to inform the Bishop whether his order is complied with."

The following is the reply of the appellant to the order of the Bishop:—"Ecchinswell, 31st May, 1867. In reply to your communication of yesterday from the Bishop of Winchester, I beg you to inform his Lordship that, with all due deference to his authority, I see neither the necessity nor the

obligation, under existing circumstances, of performing divine service at Sydmonton, and it is not my intention to resume the service there until every impediment be removed, and the church (so called) has been judicially decided to be lawfully consecrated. I have, moreover, to inform you that there is no churchwarden at Sydmonton, and therefore no need to wait for a reply to any copy of a letter or request to such to know whether his Lordship's order has been complied with or not."

The Bishop, finding that the appellant had determined to continue to keep the church at Sydmonton closed, and to disregard his order that the service in it should be resumed, instituted a suit against the appellant in the Arches Court of Canterbury, under the provisions of the Clergy Discipline Act, 3 & 4 Vict., cap. 86. The Letters of Request stated that the appellant was charged with having offended against the Laws Ecclesiastical by having omitted to perform or to provide for the performance of public divine service as prescribed in the Book of Common Prayer, and administration of the sacraments and other rights and ceremonies, in the Church of St. Mary, Sydmonton, on four successive Sundays, in the months of May and June, 1867, and therefore prayed that a citation might be issued to him to appear to answer to certain articles, &c., to be administered.

The appellant appeared under protest, and by an act or petition objected that by virtue of divers provisions contained in 1 & 2 Vict., cap. 106, and more particularly in sections 77 and 109, the Court had no jurisdiction to administer articles to him for the alleged offence of omitting to perform or provide for the performance of public divine service in the alleged church of St. Mary, Sydmonton;

That the building, called the church of St. Mary, Sydmonton, is not a church, as falsely suggested;

That an illegal ceremony of consecration had been performed within the building;

That the appellant performed two full services in the parish church of Ecchinswell with Sydmonton on the Sundays mentioned in the Letters of Request, and that by reason of the premises the Court had no jurisdiction to entertain a suit to compel him to answer Articles for not performing divine service in the building.

The Dean of the Arches overruled the protest, deciding that the offence charged was an Ecclesiastical offence cognizable under the provisions of the 3rd & 4th Vict., cap. 86, and assigned the appellant to appear absolutely.

Articles were accordingly brought in, which charged the appellant with having offended against the Common Ecclesiastical Law of the realm, and the statute 13 & 14 Chas. II., cap. 4, sect. 2, by omitting to perform divine service in the Church of St. Mary, Sydmonton, at the times mentioned, and copies of the before-mentioned letters between the Bishop's secretaries and the appellant were annexed to and made part of the Articles.

The answer to the Articles principally consisted of a denial of any liability on the appellant to perform any divine service in St. Mary's, Sydmonton, on the ground of its being an unconsecrated building, and a justification for the omission charged, by reason of his having performed two full services in the church of Ecchinswell.

The Dean of the Arches held that the Bishop had rightly exercised his discretion in commanding the appellant to perform divine service in the church at Sydmonton, and admonished him to obey the directions of his Ordinary.

Upon the hearing of the Appeal from this Judgment, the appellant in person urged various objections, some of which were of an extremely frivolous character. He insisted upon the illegality of the consecration of the church at Sydmonton, for which objection, as already shown, there is no foundation. He also objected that an ancient footway or entrance to the church had been stopped up by the patron, and a more circuitous road provided, and that it is by sufferance of the patron only that the former approach can be used. It is clear that no defence against the present charge can be rested upon this circumstance. Is there has been any improper obstruction of a right of way to the church, the appellant has his appropriate remedy.

But the appellant principally rested his defence to the proceedings against him upon the ground that there being two churches or places of public worship in the parish of Ecchinswell with Sydmonton, he had a right to shut the church against the parishioners of Sydmonton, if, in his discretion, he considered it more expedient to confine the public worship in the parish to the church at Ecchinswell.

The question is whether by so acting and persevering in keeping the church at Sydmonton closed in disobedience to the order of the Bishop, he has committed an ecclesiastical offence.

The duty of the appellant is thus stated in the 1st Article. That by the Common Ecclesiastical Law of the realm, and by the statute 13 & 14 Car. II, cap. 4, sec. 2, every Clerk in Holy Orders of the United Church of England and Ireland is bound on every Sunday (otherwise called Lord's day) in the year to perform or to provide for the performance of public divine service, as prescribed in the Book of Common Prayer, and administration of the Sacraments and other rites and ceremonies, according to the use in the Church of England, in every consecrated church or chapel of the ecclesiastical parish or benefice of which he is the incumbent.

It appears to their Lordships that the Act of Uniformity, 13 & 14 Chas. II. does not apply to this case, and that it is not a duty imposed by that Act upon an incumbent who has two churches or places of public worship within his parish to perform divine service in both of them.

The words of the Act, "Every church, chapel, or other place of public worship within the realm of England," must be read in each church, &c., in and for which there is a distinct minister. The appellant cannot, therefore, be said to have offended against the Act of Uniformity by confining the performance of morning and evening service to one of the churches in his parish, and not providing for the same services in the other church, there being nothing in the Act requiring him to employ a curate, in order that the services may be duly performed in both churches.

But the question is whether the appellant was not bound by the Common Ecclesiastical Law (to use the language of the Articles) "to perform or to provide for the performance of public divine service in every consecrated church or chapel of the parish or benefice of which he is the incumbent." If so, the Article which charges an offence against the Common Ecclesiastical Law, and also against the statute 13 & 14 Car. II., will be good, although the offence is only against the common law, and not against the statute, as the latter allegation may be regarded as mere surplusage.

There can be no doubt that the Order in Council which united the chapelries of Ecchinswell and Sydmonton into a separate parish or benefice, intended that there should be two churches (as they are called in the order) within the parish, in both of which public worship should be performed. This appears

plainly from the provisions contained in the order, "that the parishioners of Ecchinswell and Sydmonton should be liable, as theretofore, to the expenses of repairing and maintaining their respective churches and the other expenses incidental to the due performance of divine service therein respectively," and "that the parishioners of Ecchinswell and Sydmonton shall be entitled as heretofore to accommodation in their respective churches."

The appellant accepted the benefice with a full knowledge that there were two churches or chapels within the parish in which, by the instrument creating the benefice, the duty of using each as a place of religious worship, and performing some service therein, is laid upon him. If the question with the Bishop had been as to the nature and extent of the services which the appellant was bound to perform in these churches respectively, the case might have been attended with more difficulty. But the appellant takes upon himself to shut up the church at Sydmonton, and positively to refuse to perform any divine service in it, assigning reasons for this wilful neglect of the duty which he has undertaken, every one of which is insufficient, and claiming the liberty of choosing which of the two churches in his parish he will keep open for divine worship, which, if it were conceded to him, would, of course, equally enable him to close the church at Ecchinswell, and perform the whole of the divine services in the parish in the church at Sydmonton.

If, then, the appellant has neglected or refused to perform a spiritual duty which was imposed upon him by his induction into the benefice, has he not committed an offence against the Ecclesiastical Law? This in itself might render him liable to be proceeded against under the Church Discipline Act. But, beyond his neglect of duty, he has exposed himself to such a proceeding by his contumacious refusal to obey the lawful order of his Bishop. The duty of performing some divine service in the church at Sydmonton having been imposed upon the appellant, and he having shown his intention of violating it by shutting up the church and giving public notice that there would be no more service there, the Bishop, in the exercise of the authority vested in him, made an order upon him to resume the services in that church. If the appellant had entertained a sincere wish to do his duty to the parishioners, he would have consulted the Bishop as to the best mode of meeting their requirements and his own obligation; but instead of adopting this course, he defied the Bishop's authority under the semblance of deference to it, and denying the necessity and the obligation of performing any divine service at Sydmonton, expressed his intention not to resume the service there "until the church (so called) had been judicially decided to be lawfully consecrated."

The appellant, therefore, has committed an offence against the Common Ecclesiastical Law, by wilful neglect of duty, and by wilful disobedience to the order of the Bishop directing him to perform that duty.

In his act or protest, the appellant objected to the jurisdiction of the Court upon the ground that the proceedings should have been taken (if at all) under the 1 & 2 Vict., cap. 106, referring to sections 77 and 109 of that Act. It may be doubted whether the Act referred to is applicable to this case. By the 77th section it is provided that whenever the Bishop shall see reason to believe that the Ecclesiastical duties of any benefice are inadequately performed, it shall be lawful for him to issue a Commission, to be constituted in the manner prescribed; and if the Commissioners report to the Bishop that in their opinion the duties of such benefice are inadequately

performed, he may require the spiritual person holding the benefice to appoint a curate.

And the 109th section enacts, that in every case in which jurisdiction is given to the Bishop of the diocese, or to any Archbishop, under the provisions of this Act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdictions in respect thereof shall wholly cease; and no other jurisdiction in relation to the provisions of this Act shall be used, exercised, or enforced, save and except such jurisdiction of the Bishop and Archbishop under this Act.

It may be open to doubt whether the shutting up one of two churches in a parish where divine worship is required to be performed in both, comes within the meaning of the words "inadequate performance of Ecclesiastical duties," and can be dealt with as falling under the 77th section. But assuming that it might, if the act done involves an Ecclesiastical offence, does the 109th section of the 1st & 2nd Vict., cap. 106, compel the Bishop to adopt the course pointed out by the statute, not for visiting the offence, but for enforcing the proper performance of the duties which, by reason of the offence, have been inadequately performed? The words of the 109th section are, that no other jurisdiction in relation to the provisions of the Act shall be used. Therefore, if the Bishop were proceeding to compel the appellant to appoint a curate, he must have pursued the course prescribed by the Act, and have issued a preliminary Commission of Inquiry. But his proceeding being for an offence committed by the appellant against the Common Ecclesiastical Law, the jurisdiction of the Court is not taken away by the 109th section, and the suit is properly instituted under the Church Discipline Act.

Their Lordships are of opinion that the appellant, by shutting up the church at Sydmonton, and refusing to perform divine service there, notwithstanding the mandate of the Bishop, has committed an Ecclesiastical offence, and they will, therefore, humbly recommend to Her Majesty that the Judgment of the Arches Court should be affirmed, and the Appeal dismissed with costs.

In the following case the Judicial Committee of the Privy Council was constituted under the general law, consequently no spiritual person sat upon the tribunal.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rugg v. *Kingsmill, from the Court of Arches; delivered March* 11, 1868.

Present: Master of the Rolls [Romilly]; Sir James W. Colvile; Sir Edward Vaughan Williams; Sir Richard T. Kindersley; Judge of the Admiralty Court [Phillimore].

This is an appeal from a sentence pronounced by the late Judge of the Arches Court at Canterbury, whereby he affirmed the sentence of the Consistorial Court of Winchester, which decreed a faculty to issue to Mr. Kingsmill, authorizing the appropriation to that gentleman of a vault under the chancel of Sydmonton Church.

This church is situate in the parish of Sydmonton, in the county of Southampton.

It appears that the whole property, as well as the principal house in the parish, belongs to Mr. Kingsmill, and that, with the exception of the consecrated ground upon which the church is built, he is proprietor of all the land

up to the very walls of the church, which has no burial-ground attached to it.

In the year 1849 there was a chapel which occupied the site of the present building. Under the chancel of this former chapel the father of Mr. Kingsmill possessed a vault.

In 1849 the chapel was pulled down.

In 1852 Sydmonton with Ecchinswell, which formerly formed part of the parish of Kingsclere, was formed, under an order in Council bearing date 19th August, 1852, into a distinct and separate parish for Ecclesiastical purposes.

In September, 1852, Mr. Rugg, the appellant, was instituted Incumbent of Ecchinswell with Sydmonton.

In 1853 the present church was built by Mr. Kingsmill, at his sole cost and expense.

In August, 1864, the church was consecrated. In August, 1865, the faculty now in question was granted by the Consistory of Winchester.

Before a faculty, either to the parishioners in general or to a private inhabitant of the parish, can be decreed, the Ecclesiastical law requires that all persons interested in opposing the grant should have an opportunity of being heard before the Ordinary.

The faculty which has been decreed in this case is, as has been stated, for a burial vault underneath the chancel.

The objector to the grant of the faculty is the Incumbent, who is either Vicar or Perpetual Curate. The applicant for the faculty is the impropriate Rector, who resides in the parish, and whose father appears to have rebuilt and partially endowed, at his own cost, the church.

The Vicar, or Perpetual Curate, although entitled to officiate in and to have free access to the chancel, has no right, strictly speaking, to fees for the erection of monumental tablets, or for the construction of vaults (in the very rare instances in which they should be allowed) in the chancel; but he has certainly a *persona standi*, by reason of his general spiritual position as Incumbent, to oppose the grant of such a faculty as the present.

The objections of the appellant to the sentences from which he appeals are various.

First, he contends that the Ecclesiastical Court had no jurisdiction to grant this faculty. He supports this objection by reference to the facts that there is no burial-ground attached to this chapel,—that no funeral has ever taken place there,—that the inhabitants of the district have consequently no general right of burial connected with the chapel, and his argument appeared to extend so far as to question the validity of the consecration of the chapel itself by the Bishop.

Their Lordships, however, see no reason to doubt that the Bishop had full authority to consecrate this building, and they are of opinion that the objection founded on the absence of any burial-ground, and of any general right of burial on the part of the parishioners, did not render unlawful the act of the Ordinary, though it imposed upon him the duty of exercising with much caution the discretion which the law has vested in him as to granting a faculty of this kind.

The appellant further contended that the grant of this faculty was bad upon the ground that the proper forms prescribed by the practice of the Ecclesiastical Court had not been complied with. Their Lordships, however,

are of opinion that the case was regularly and properly conducted in the Diocesan Court of Winchester, and that this objection cannot be sustained.

The appellant contends that this faculty could not be granted without his consent, but this contention is not supported by authority or practice. The Vicar, or Perpetual Curate, as has been stated, is entitled to be heard against the grant of the faculty, and his objections ought of course to be considered by the Ordinary, but the discretion of the Ordinary is not fettered or taken away by the dissent of the Vicar.

There are objections, however, urged by the appellant which are of a more serious character. They may be all ranged under the general head—that the discretion of the Ordinary was unwisely exercised in the grant of this faculty.

From the decision of the Ordinary an appeal lies to the Archbishop, and ultimately to the Crown, under the advice of the Judicial Committee of the Privy Council.

If we think that the grant of this Faculty, though not absolutely illegal, was, as it at present stands, indiscreet and likely to give rise to future troubles and difficulties in the church and district of Sydmonton, which were not duly considered by the Ecclesiastical Courts, we ought to advise Her Majesty accordingly.

The appellant has pointed out to their Lordships that the ground upon which the church stands alone is consecrated, that the jurisdiction of the Ordinary depends upon the consecration of the ground, and does not extend over any part of the ground which comes up to the very walls of the church. The legal consequences of this circumstance, upon which the appellant insists, will presently be noticed.

Their Lordships, having regard to the peculiar circumstances of this church and parish, are not disposed to dissent from the opinion expressed by the Judge of the Arches Court, that the judicial discretion of the local Ordinary was lawfully exercised in granting permission to Mr. Kingsmill to retain for the use of himself and his family, so long as they shall remain proprietors of Sydmonton Court (for this must of course be a provision contained in the instrument), the vault which has been constructed underneath the chancel.

Their Lordships desire that it should be understood that they do not mean to express any approbation of a general practice of granting faculties for interments in chancels or the body of churches. On the contrary, they are of opinion that very exceptional circumstances can alone justify such an exercise by the Ordinary of the discretion which the law has vested in him.

With respect to the particular faculty the consideration of which is now before their Lordships, they have come to the conclusion that it ought not to be issued at the present time, in the manner proposed.

Their Lordships are extremely reluctant to interfere with the exercise of the discretion in these matters by the local Ordinary, and they fully recognize the expediency of the rule of practice which discountenances such interference. But their Lordships think that the objection to the immediate issue of this faculty, while the only entrance to the vault is in the private and unconsecrated ground of Mr. Kingsmill, is deserving of great consideration. In the first place it is clear that the Ordinary could not compel the Incumbent by Ecclesiastical censures to perform the Burial Service in the unconsecrated ground in which the only entrance to the vault is to be found. It has not been argued that the Ordinary could so compel the Incumbent: indeed it

has been very properly admitted by the Counsel for Mr. Kingsmill, that no authority can be found for such a practice.

In the next place, it appears to their Lordships to be inexpedient that the spot upon which a portion at least of the Burial Service is usually performed by the Minister should be exempt from the jurisdiction of the Ordinary.

It is true that the Ordinary would have jurisdiction over the vault itself, and that the whole Service might lawfully, their Lordships think, in the peculiar circumstances of this case, be performed in the church, and the corpse afterwards taken into the garden, and deposited in the vault; and their Lordships do not mean to say that the Ordinary might not be enabled to punish any unlawful proceedings which might precede or accompany the act of burial; but it is also true that the absence of any Ecclesiastical jurisdiction over this spot of ground might afford an apparent impunity to evade the law, and thereby possibly cause a scandal in the parish.

If, in the present state of circumstances, the grantee of this faculty or his successors in the mansion to which it is in fact attached, were hereafter, either perhaps on account of their having ceased to be members of the church, or on account of some quarrel with the Incumbent, or for any other motive, to cause a Service different from that which is enjoined in the Prayer Book to be read over the corpse, or if they were to place the body in the vault without the previous performance over it of any religious Service, in any case of this kind the present or future Ordinary might be considerably embarrassed in the exercise of his proper jurisdiction to remove the scandal, or to punish the authors of it.

Their Lordships think that it is the duty of the Ordinary, when granting a *privilegium* of this kind, to take every precaution in his power against the possibility of a misuse by the grantee or his representative of the special favour which is conceded to him. They see no reason why the grant of this faculty to Mr. Kingsmill should not be made conditional upon his consenting to allow a sufficient piece of ground near the aperture to the vault to be first duly consecrated for the sole and special purpose of burials in this vault. The jurisdiction of the Ordinary, *ratione loci*, would then be unquestionable; and any impropriety with relation to the performance of the Burial Service would be subject to his correction and control.

Their Lordships, therefore, think that this cause should be remitted to the Court of Arches, with directions to issue the faculty in question whenever it has been duly certified to that Court that the consecration of the additional portion of ground has taken place; and with power, if it should be deemed necessary, to vary the terms of the faculty by a reference to a recital of the fact of such consecration having been effected.

Their Lordships think that both parties ought to bear their own costs incurred in this Court and in the Court of Arches.

Their Lordships will humbly advise Her Majesty in accordance with the opinion which they have now expressed.

In the following case the Judicial Committee of the Privy Council was abnormally constituted under a particular method of proceeding (vid. sup. Ch. VI., p. 51), consequently a spiritual person sat upon the tribunal.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Simpson v. *Flamank, from the Court of Arches; delivered 29th June*, 1867.

Present:—Lord President [Buckingham]; Archbishop of York [Thomson]; Lord Cairns; Lord Justice Turner; Sir Edward Vaughan Williams; Sir Richard Torin Kindersley.

Their Lordships having heard the case of the appellant elaborately argued, have not thought it necessary to call upon the Counsel for the respondent, and are now prepared to state the reasons for the advice which they propose humbly to tender to Her Majesty in reference to this Appeal.

It was, in the first place, contended that the Commission issued on the 20th of June, 1866, by the Lord Bishop of Exeter, did not state on the face of it that the offences mentioned in it had been committed within the two years defined by section 20 of the Act 3 and 4 Vict., cap. 86, and that therefore the Report of the Commissioners, and all the subsequent proceedings were invalid.

Their Lordships are unable to see any foundation for this argument. The statute, although it prescribes a limit of time within which the proceedings by Commission must be commenced, is silent as to any specific form of, or statements in, the Commission; and the notice of the Commission, which the Statute requires to be given to the person accused, is to state the nature of the offence, with the names, addition, and residence of the party on whose application or motion the Commission is about to issue, and nothing more.

The Commission, and the notice in the present case, allege with substantial, if not with technical distinctness, that the offences which are charged are continuing offences; and the appellant, when he appeared before the Commissioners, objected by his Counsel, not that the offences were not in fact committed within two years, but merely that they were not alleged to have been so committed; and this objection having been overruled, the appellant admitted the facts mentioned in each of the charges. The appellant, therefore, has in no way been misled or prejudiced in the course of his defence before the Commission; and this part of the Appeal against the form of the proceedings is, in their Lordships' opinion, wholly without justification.

Their Lordships, however, although they have entered into the merits of this objection of the appellant, desire to express no dissent whatever from the view of the Dean of the Arches, that the proceedings before the Commissioners would not be open to appeal before the Arches Court on the score of irregularity; and this part of the Appeal to Her Majesty would, on this ground also, fail.

It was argued, in the next place, that the degree or citation from the Arches Court ought to have stated, and did not state, that the offences alleged had been committed within two years previous to the citation. The case, it was said, if sent by the Bishop, under section 13 of the Act, to be heard before the Court of Appeal of the Province, must be there "heard and determined according to the law and practice of such Court," and the practice of the Court of Arches, it was contended, required that the decree should show on the face of it jurisdiction in this respect.

The appellant did not raise this objection in the Court of Arches by appearing under protest. On the contrary, he appeared absolutely to the citation, and prayed Articles, and afterwards opposed, on this ground, the admission of the Articles. Their Lordships will, in favour of the appellant, assume, although they would hesitate to decide, that it was open to him, after appearing and praying Articles, to object to the citation in point of form; and they will also assume in his favour, although they think it open to doubt, that the statement in the citation of offences as continuing offences did not sufficiently show a jurisdiction under the statute.

The statute, however, by section 13, provided that the Judge of the Arches Court should have power to make orders for expediting suits under the Act, or otherwise improving the practice of the Court. It appears that by the Rules or Orders of the Arches Court, made under this statute, and in force at the time of this citation, a form of citation or decree was given, approved of by the Judge; and in this form, obviously intended to shorten what had been previously in use, no provision is made for a specification of the offence, or for a statement of the time when or within which it was committed; but the letters of request are referred to as remaining in the Registry of the Court, and as being the foundation of, and therefore showing the jurisdiction to issue, the decree. The form of decree citing the appellant appears to their Lordships to have been in accordance with the form given by these orders; and the letters of request which the decree refers to contain an express statement that the offences alleged were committed within two years. The decree appears, therefore, to their Lordships to be in accordance with the practice of the Court; and they are unable, as to this, as well as in the case of the other objection, to look upon it otherwise than as groundless, and made only for the purpose of delay.

Their Lordships will humbly advise Her Majesty to dismiss the Appeal with costs.

In the following case the Judicial Committee of the Privy Council was abnormally constituted under a particular method of proceeding (vid. sup., Ch. VI., p. 51); consequently a spiritual person sat upon the tribunal.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Rev. Thomas Berney v. *the Lord Bishop of Norwich, from the Court of Arches; delivered 28th February,* 1867.

Present:—Archbishop of York [Thomson]; Sir William Erle; Sir James W. Colvile; Sir Edward Vaughan Williams; Lord Justice Cairns; Sir Richard T. Kindersley.

This was a proceeding under the *Church Discipline Act* against the Rev. Thomas Berney, in which articles were exhibited, charging him with having solicited the chastity of Mrs. Cumming on two occasions, and of Miss Durrant on two occasions, and after a trial in the Court of Arches it was decided that those articles were substantially proved, and he was sentenced accordingly to suspension and deprivation for two years. Upon the present Appeal the correctness of that decision is to be tried, and we are to say whether either of those articles is substantially proved by the evidence returned on this record.

Before we examine that evidence particularly, it may not be superfluous to observe generally that the charge described by the terms "soliciting the chastity" imputes very aggravated guilt; and the evidence would not be sufficient to prove either of the articles unless it convinced this Court that the appellant had endeavoured to obtain criminal intercourse with both or either of the witnesses by the solicitation for that purpose appearing on the record, and that evidence of indiscreet or improper conduct is irrelevant unless it tends to prove that purpose, either of adultery or seduction.

It may also be worth observing that the offence, if committed at all, consisted almost entirely in words supposed to have been spoken by the defendant when no third person was present. These words do not express definite conceptions in a known course of business, such as the words of a merchant to a broker, but they are words of fleeting suggestion, words of which the meaning would be varied by reference to surrounding circumstances known only to the parties, and would be varied materially by a small addition or elision; words so spoken that they cannot be expected to be exactly recalled; and it is obvious that there may be injustice in holding the defendant responsible for words not really his own, but which the witnesses believe to be equivalent thereto. These considerations have more weight when the words are recounted by one party only to the conversation, and the other party (the accused) is not allowed to be heard, to explain, or contradict them.

(This point was so decided in the case of Burder *v.* O'Neil, as to the proper construction of the statute in this respect, and the Advocate for the defendant was bound thereby upon this trial. But the point may be worth re-considering if need should hereafter arise.)

Adverting now to the undisputed facts of the case. It appears that the appellant and Mr. and Mrs. Cumming, residing near together, were living on very friendly terms of neighbourly intimacy, and that in April, 1864, Miss Durrant came to visit her sister, Mrs. Cumming, and stayed for some weeks. During these weeks the interchange of visits between these parties increased in frequency, and the appellant, a single man, was frequently at the rectory, where Mr. and Mrs. Cumming resided, and found himself at times alone in company with each of these ladies, and the parties had several pursuits in common connected with life in the country. This even flow of apparently tranquil enjoyment is alleged to have been disturbed by the four offences imputed to the defendant in the 6th, 7th, 8th, and 9th Articles; the 6th and 7th relating to Mrs. Cumming, and the 8th and 9th relating to Miss Durrant, each being a separate offence, and the proof of each depending on the evidence relevant thereto.

We come now to the articles, and we take first the charges contained in the 6th and 7th Articles, depending on the statement by Mrs. Cumming, of matters alleged by her to have occurred on or about the 11th and 21st of May, 1864. In the first charge the words imputed are, "Come on the sofa with me; the blinds are down. Mr. Cumming will never know any thing about it, and it will be a *liaison* between us;" and the acts imputed are that he looked at her and took hold of her hands. On the second occasion the words imputed are, "I want something so very bad; I've been so excited all the week; do let me have my own way. A slice out of a cut cake will never be missed. I shall go crazy if you don't let me have my own way. I shall go home and make a fool of myself with Susan."

The acts imputed are that he shut the doors of the room, and placed a hand on the knee of the witness.

This statement, if it can be entirely relied on, is sufficient to raise the presumption that the appellant did endeavour on each of those days to procure immediate criminal intercourse with Mrs. Cumming, a presumption which ought to prevail upon this Appeal unless we find it to be more than counterbalanced by presumptions placed in the opposite scale.

The former character of Mrs. Cumming has not been impeached, and we take it to be clear that her manner in giving her evidence prepossesses in her favour. But although the presumption from this statement is strong against the appellant, yet daily experience shows that a tribunal trying questions of fact, ill performs its duty if it adopts as true every statement on oath not contradicted by counter testimony; it being in accordance with that experience that many such statements ought to be disbelieved, and that, without imputing perjury. The witness may be mistaken in her perceptions or in her inferences from her perceptions, or her statement may be so invalidated by reason of improbabilities, as to be insufficient for convicting of a crime.

The statement which we are now to examine makes the charge of guilt to rest almost entirely on words, with scarcely any concomitant act. Justice therefore requires that we should be sure that the words alleged in the articles are substantially the words of the appellant. But the presumption to the contrary is very strong. It is very rare for a witness to be able to repeat exact words, even their own. The words in question are incoherent, unless the purpose of adultery is assumed, which is the matter to be tried. No complaint was made to any third person either at the time or for weeks after, so that the appellant might explain while the matter was fresh. When the complaint was made, it was marked with a deceptive generality, specific neither in time nor place, nor in definite conceptions, attaining at last the form appearing in the Articles by gradual steps, as alleged by the Counsel for the appellant. It is certain that the witness's memory cannot be relied on for accuracy, as the charge in the Articles varies in some degree from the charge in her evidence; and the charge in her evidence also varies from the memorandum which was prepared by her some time after the fact, for the purpose of preparing for examination; indeed this memorandum is decisive proof of want of perfect recollection, by reason of its alteration and erasure, and interlineations.

On these grounds we think that there is reason to doubt the exact correctness of the evidence relating to the defendant's words.

But whatever may have been the words that passed, the admitted conduct of the parties raises a strong presumption against the truth of the statement on which this part of the case turns, namely, that the witness understood that the appellant had proposed immediate adultery.

Considering the social position of the parties, and the even tenour of agreeable society in which they lived, and the time and place alleged, it seems improbable that the appellant should disturb that even tenour by suddenly and without preliminary, making to the lady a proposal which must shock any but a known profligate,—that is, immediate adultery in mid-day, in a room comparatively open to interruption; and it is an additional improbability that this proposal should be made to a lady whose ill health, as alluded to by Counsel, was known to the appellant. It also seems improbable that such a proposal should be passed by the woman without any resentment manifested to any human being, and that on her refusal to consent to an act of heinous guilt, the man should resume his paint-brush and complete, as if in tranquillity, the forms and colours of the designs for flower-borders which were produced in evidence.

The subsequent conduct of the witness raises a still stronger counter presumption against reliance on her statement.

If we take the alleged proposal of the 10th of May, after the husband's return the appellant packed up his drawings and went home, but left his paint-box by mistake; the witness asked her husband to take it to the appellant, who needed it for a visit he was about to make to his mother, and the husband did so. If she desired to promote the convenience of a neighbour whom she knew, this would be consistent. If she had been insulted and degraded, and an attempt had been made to bring misery on herself, her husband, and her family, this apparent courtesy would be inconsistent, and the attempt to explain it by saying she wished to avoid seeing the appellant again, coupled with the other facts, seems to us to be an unreal pretence; this was the immediate sequel to the proposal of the 10th of May.

On the 12th the appellant sent a vase, either as a present or a loan. Is it to be supposed that if the witness was actuated by the feelings which she now says prompted the return of the paint-box by her husband, she would not have sent back the vase, and found some reason for doing so? But the vase was accepted, and the witness and her sister took pleasure in decorating it with flowers, as they would a present which was valued for the sake of the giver.

Next followed the letter of the 15th of May (from Mrs. Cumming to the appellant), which seems almost decisive against relying on her statement. It may be true that Mr. Stewart requested her to write what relates to the harmonium. It may be true that the husband gave the form of conclusion, "Believe me yours sincerely." But there are parts of the letter which, by evidence internal as external, are, in our opinion, her own, and express unalloyed favourable feeling, and a desire for the continuance of friendly intercourse and correspondence. For example, she writes, "You could scarcely have had more lovely weather for gardening. I hope the plans were approved of by Mrs. Berney. I shall be anxious to know how you get on. Bessie was quite sorry she could not see the painting when it was finished. Mr. Cumming and Bessie unite with me in very kind regards."

The easy flow of allusion to small subjects seems irreconcilable with the notion that she was knowingly addressing a man who only a few days before had offered her the grossest insult a woman could endure; and the meaning of the passage, "Bessie was sorry she could not see the painting when it was finished," was realized when the appellant proposed to show the drawing to the sister, and the witness purposely left her sister alone for an interview with the appellant in his library, to be followed by a walk together home.

The attempt to explain this letter as the result of dictation is not satisfactory to their Lordships.

All that follows is consistent with our interpretation of this letter, if we except the second proposal of instant adultery on or about the 21st of May, on the ground of the animal impulse which troubled the appellant; a proposal in its circumstances of time and place, and by reason of its antecedents and consequences, quite as improbable as the charge of the 11th of May; nor can we omit to observe that the presence of the appellant at the meeting of the 21st of May, a fact denied by him in his pleading, rests on the testimony of Mrs. Cumming. On her own showing this part of her evidence might have been corroborated by her husband, her sister, and the nurse. It has not been so corroborated. Each attempt at adultery is brought into the chain of events by an apparent disruption of links; no events led up to it,

none followed from it; and this must always be the case when an unreal fact is introduced into a narrative of real events.

We do not stop to inquire whether the picnic parties after the guilty proposal were one or two; whether the sacrament was administered by Mr. Berney or Mr. Moss; whether the dinner at the Hall was consented to by Mrs. Cumming for fear of creating suspicion in her husband's mind, or in the course of neighbourly intimacy. It is undisputed that the form of the intercourse continued in appearance to be of the friendly character which would be inconsistent with the charges now brought forward down to the 15th of June.

After the 15th of June came that which Counsel have called the "quarrel arising out of the last interview with Miss Durrant," resulting in the charge which led to the Articles we have now had to consider.

We have assumed that the charges contained in the 6th and 7th Articles were grounded entirely on the statement of Mrs. Cumming, and we did so because in our judgment the final letter of the appellant after the 15th of of June is no corroboration of that statement.

The facts relating to this letter appear to be, that in the course of the trial, long after the preliminary inquiry and the manifold delays of the pleadings, the Counsel for the respondent saw the appellant's letter, and then in the course of the trial gave notice to produce Mr. Cumming's letter to which the appellant's letter was an answer. This letter was not produced: whether it was lost or destroyed, or in existence, the appellant was supposed to be not admissible to prove. It was not produced, nor was secondary evidence admitted. We must take the evidence as it is on the record, and we do not see that any presumption ought to be made against the appellant by reason of its non-production under these circumstances.

The letter of the appellant before us is evidence on the 6th and 7th Articles against the appellant so far only as it amounts to an admission that he had solicited the chastity of Mrs. Cumming. It ought not to weigh against the appellant on this charge if it only indicates that he may have trespassed beyond some limits with Miss Durrant, and in our judgment that is the fair meaning of the letter. He writes, among other things, "that some little latitude is allowable when two persons are much thrown together, and are daily meeting in mirth and fun. Nothing can be farther from my wish than to give offence by exceeding its proper limits." He then offers his most sincere apology and his sorrow that any thing should have occurred to mar the harmony which had existed.

Upon our construction this letter does not tend to prove the guilt imputed in the 6th and 7th charges. The appellant has a right to the presumption in favour of innocence till guilt be proved. In a criminal case the tribunal trying the accused cannot assume that Mrs. Cumming had complained of an attempt on her chastity, or that Mr. Cumming's letter charged the appellant therewith. We have the appellant's letter before us, and the words of that letter are to be taken in the ordinary sense.

We assume upon the evidence that the complaint of Mrs. Cumming to her husband was made after the appellant had attempted some freedom with her sister. If that was the ground of the complaint in Mr. Cumming's letter, the whole of the appellant's letter would have a reasonable meaning; whereas if the husband had complained not only of something that had passed between the appellant and Miss Durrant, but also that the appellant had solicited the chastity of his wife, the letter would be irrelevant to such a charge and

an aggravation to the injury complained of. We therefore do not consider that the letter admits that the appellant had attempted the chastity of Mrs. Cumming.

Upon this review of the evidence in support of the charges by Mrs. Cumming, we have weighed presumptions against counter-presumptions, confining our attention to the evidence relevant to each separate charge, and excluding any prejudice from a repetition of charges not supporting each other according to legal reasoning, and we have come to the conclusion that the guilt imputed in the Articles 6 and 7 is not sufficiently proved.

With respect to the charges contained in the 8th and 9th Articles, founded on the statement made by Miss Durrant, the substance of the statement, as far as it relates to the 29th of May, is, that being left by her sister in company with the appellant, for the purpose of seeing some drawings in his library, he then tried to kiss her, and said, "You need not be afraid, I will not get you into any trouble; do come up stairs" (meaning to the drawing-room); and on her refusal to do so he said, as he was walking home with her, "The drawing-room is unfurnished, and a roll of carpet is a poor substitute for a sofa."

And as far as it relates to the 14th of June, the substance of her statement is, that the appellant, being in the drawing-room of the rectory, asked her to come and sit on the sofa, and on her refusal said, "Why not? I will not get you into any trouble." That he then took hold of her wrist, and pulled her, adding, "Oh, do!" on which she said, "Mr. Burney, if you do that, I shall scream;" and she then left the room.

The charges contained in these Articles rest entirely on the statement by Miss Durrant. The letter of the appellant to Mr. Cumming after the 15th of June does not, in our opinion, admit that he had intended and endeavoured to have criminal intercourse with Miss Durrant, and this opinion is founded partly on the same reasons as induced us to think it did not admit that intention and endeavour with respect to Mrs. Cumming. Then if we confine our attention entirely to the statement made by this witness, and assume for the present purpose that reliance can be placed on the accuracy of her memory, still we do not see sufficient evidence that the defendent intended and endeavoured to obtain criminal intercourse with her, that which passed being capable of a less guilty construction. The parties were on such terms that the appellant might properly make advances to the lady if she chose to accept them; and if, in doing so, he transgressed the bounds of good manners and decorum, and so gave offence, it does not follow that he had the guilt which the offended parties, going back over that which had passed without notice at the time, chose to impute.

Their Lordships, therefore, are prepared to recommend to Her Majesty that the sentence of the Court below should be reversed, and that the defendant should be discharged from further proceedings.

Their Lordships, in the exercise of their discretion, will further recommend that this reversal of the Judgment of the Court of Arches should be without costs to the appellant, either of the appeal or in the Court below, being of opinion that the Bishop in these proceedings was performing an onerous duty of the highest importance to the public, imposed upon him by law without recompense or protection, and that he acted throughout in perfect accordance with that duty.

In thus reversing the decision below, without imposing costs on the respondent, we follow the precedent of *Craig* v. *Farnall* (reported on an

incidental matter, 6 Moore, 446, and on the merits, Notes of Cases, vol. vi., 682), where the event of each proceeding was the same as in the present case, and it appears that the respondent paid his own costs, and not those of the appellant, Mr. Craig.

In the following case the Judicial Committee of the Privy Council was constituted under the general law, consequently no spiritual person sat upon the tribunal.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Rev. E. Parker v. *Leach, from the Chancery Court of York; delivered 20th November*, 1866.

Present: Lord Westbury, Sir James W. Colvile, Sir Edward Vaughan Williams.

The appellant in this case is the perpetual curate and incumbent of the parish church of Waddington, in the Diocese of Ripon and Province of York; the respondent an aged gentleman resident within the same parish.

There is in the chancel of the parish church a pew, claimed as belonging to the Honourable Mrs. Ramsden, in respect of her being the owner of an ancient messuage within the parish. Mrs. Ramsden has given licence and permission to the respondent to occupy that pew, of which she is the proprietor; the respondent has had the use and enjoyment of it for nearly forty years.

In the month of December, 1863, the appellant, without the authority of the churchwardens, appears from the evidence to have gone to a carpenter, an inhabitant of the parish, to have brought him into the chancel, and to have pulled down and entirely destroyed the pew which the respondent had been in the habit of enjoying.

This was followed by an action for perturbation of the pew commenced in the Diocesan Court, and removed by letters of request to the Appellate Court at York.

To the libel of the respondent, the appellant pleaded that there was no jurisdiction in the Archbishop, because the church was not, in law, a church at all, never having been re-consecrated since its general repair or rebuilding in the year 1826.

Now the appellant has been himself for three years the incumbent of the church; Divine Service has been celebrated there by him, and by his predecessors; baptisms have been performed there; marriages have been solemnized there; the Holy Communion has been administered in it for nearly forty years. It is a plea, therefore, pregnant with the most formidable consequences, if it be found to have any support in law.

The points which have been argued may be thus arranged. It is contended by the appellant, as a general proposition, that if a church be taken down and rebuilt, though it be rebuilt again upon the same foundations, the new edifice requires to be re-consecrated; and until it be re-consecrated the appellant contends that it can have none of the character of a church; that such an edifice, in point of law, is to be regarded no more than if it were any common building within the parish.

Such is the legal proposition which is first put forward on the part of the appellant.

The second proposition is, that the church in question, viz. this parish church of Waddington, had been rebuilt in such a manner as to bring it within the scope of the first proposition which he lays down, viz. that it was wholly rebuilt, and therefore required re-consecration.

The third ground that has been maintained by the appellant is a technical one, relating to the form in which the title to the enjoyment of this pew was laid by the respondent in his libel.

To prove the first proposition, viz. that a church rebuilt upon the old foundations, if it be entirely or substantially rebuilt, requires re-consecration, very little authority has been produced. No decided case has been cited to their Lordships, with the exception, perhaps, of a case noted in Burn's Ecclesiastical Law, in which it is said that the church of South Malling having been polluted and pulled down, was new built and then used for divine offices without new consecration. Archbishop Abbot interdicted the minister, churchwardens, and parishioners from the entrance of the church until the church and the churchyard thereof should be again consecrated.

The particulars of the case are not given. It is a citation from Gibson's Codex, and it can hardly be regarded as any thing like a solemn legal decision on the point. Two things however, appear to have occurred, viz. that the original church was polluted in some manner not described, and probably on that ground was ordered to be pulled down, and then there was a new fabric which was considered by the Archbishop as requiring consecration.

The other cases cited to their Lordships contain mere *dicta* of different Judges, and do not involve the point now in question.

The case most relied on is one which occurred in the Diocese of Rochester, the case of Battiscombe *v.* Eve (7 "Law Times" N. S. 697), in which the Chancellor, Dr. Robertson, cited a treatise of very early date, written anterior to the Reformation, in which the following expressions are used:—"In tribus casibus debet ecclesia dudum consecrata iterum consecrari." After stating two instances which do not bear on the case, he proceeds:—"Tertius est, si ecclesia, *funditus sit disrupta, vel etiam ex toto reparata*, sive ex eisdem lapidibus sive ex aliis." That is to say, where the church has been destroyed from the foundation stone, *funditus disrupta*, or where the church has been *ex toto reparata*—restored *ex toto*, completely from the top to the bottom in every part.

It is unnecessary in the present case that their Lordships should give any judicial opinion upon this general question, for reasons that will presently appear; but their Lordships are particularly desirous that it should be understood that they do not mean by any observation to give authority to the position that if a church be rebuilt upon the old lines of foundation, including within it the same originally consecrated ground, and no more, such church does need re-consecration. We give no judicial opinion upon that. We desire, however, to have it clearly understood, that we do not by any means intend to recognize or to sanction such a doctrine, as being in our opinion a just view of the law. But that point will not be involved in our present judicial determination.

The judicial ground for the determination we arrive at, rests upon the view we have taken of the second question; the second question being an inquiry whether in this particular case the church was wholly rebuilt, so as to come

within the meaning of a church *ex toto reparata*, assuming for the moment that such a a new building might require re-consecration.

Now the history of the proceedings is this :—

A faculty was applied for and granted for the repair of the church. The church consisted of a nave, two aisles, the chancel, and tower. It would seem that it had been ascertained that the walls of the body of the church, including the nave and aisles, required to be completely taken down and renewed. The tower did not stand in need of reparation, but all the walls, running from the tower north and south to the east, required entire rebuilding. The eastern wall did not stand in need of being rebuilt. Accordingly the faculty directed the repair of the church to be made in conformity with that necessity. The tower, therefore, remained untouched; the eastern wall, in which were three windows—a large window and two smaller windows, one on either side—also remained untouched, except so far as it was necessary to pull down a part at either end of the eastern wall for the purpose of tying on to it the new north and south walls that were erected.

The whole of the interior of the nave or body of the church appears to have been altered; and whereas in former times there was an arched doorway communicating between the nave and the tower, that doorway was stopped up; a new porch or entrance to the body of the church was erected, the north and south walls were erected, and the interior of the nave of the church was renewed.

With reference to the chancel there is some conflicting evidence, but the witnesses agree that the Communion-table, within the chancel, had on either side of it, north and south, two low walls forming as it were an interior chancel. These low walls were not touched, so far as removal was concerned, but they appear to have been added to and carried to a greater height. The Communion-table, being very old, was replaced by a new one.

It is said that some of the pews then existing in the chancel were taken down and new ones erected, but upon the whole of the evidence the conclusion is that the pews in the chancel were allowed to remain. There may have been in some instances new wood-work, but substantially the chancel remained, save so far as we have mentioned, unaltered.

Now it must be observed that this was done under a faculty granted by the diocesan; it was done, therefore, by virtue of ecclesiastical authority. It is extremely difficult to understand how that which was done by virtue of ecclesiastical authority could have the effect of rendering the thing itself, when done, exempt from that authority which was necessary for the doing of it. We put it, therefore, to the learned counsel whether there was any instance of repairs or rebuilding done under a faculty which had been held to require re-consecration? No such case has been produced to us. That case which occurred in the Diocese of Rochester appears to have proceeded wholly upon the ground that there the church had been repaired or rebuilt without a faculty; and having therefore been called into being not under ecclesiastical authority, the learned Judge thought, rightly or wrongly, that it required re-consecration or re-dedication (the two words legally meaning the same thing), in order to give it the character of an ecclesiastical edifice, so as to be subject to the jurisdiction of the diocesan. It is a decision, which, so far as it goes, would seem to carry with it, by implication, the conclusion, that if the reparation, however extensive it might be, had been done under a faculty, it would have precluded the allegation that it was a building which remained free from ecclesiastical authority until it was reconsecrated.

So far, therefore, as that decision goes, it seems to present an expression of opinion that whatever was done under the faculty, being done under ecclesiastical authority, the building in respect of which it was so done must be considered as remaining subject to ecclesiastical authority.

But that is not by any means the whole of the case, for the respondent avers that when the portions of the church which were rebuilt were pulled down, and while the edifice was therefore no longer fit to receive the parishioners for the purpose of public worship, marriages were still performed in the church, and the sacrament of Baptism continued to be administered. Marriages were celebrated in the tower whilst the church was in the act of being rebuilt; marriages were also celebrated within its incipient walls. At no time, therefore, has there been any disuser of the edifice as a church. It has been treated as the parish church, and used, even during the very act of rebuilding, for those ceremonies which could only be performed within the parish church. That which remained, therefore, the tower and other portions of the building, still retained their ecclesiastical character: and its use as a parish church has never been abandoned.

It is impossible to suppose that under such circumstances the building can have become desecrated, and so stripped of its original sacred character as to require that it should be again consecrated.

A question was put several times to the learned counsel, by whom we have been much assisted, and who would have been able to answer the question if there are any counsel able to answer it, whether pulling down the nave would involve a desecration of the tower, so that it also must be re-consecrated. Whether the same doctrine would apply to the eastern wall and the chancel? Whether those marriages and baptisms were all illegally performed which were performed when a certain part of the church was on the ground, and while the act of rebuilding was going on?

It was impossible that the answer to those questions could be either that these things were illegally done, or that the tower and the other buildings had lost their original sacred character acquired by virtue of the prior consecration.

Another question was put to the learned counsel: whether there was any form given, or whether any instance could be cited of a partial consecration of a church, i.e. of a portion of the church? Because the rule being, that what has been once consecrated shall not be re-consecrated, the consecration in the present case must be limited entirely to the body of the church, excluding the chancel and the tower. That would be an anomaly of which no example or precedent has been mentioned.

Reference was made to a case which occurred before Dr. Lushington in the Court of Arches—the case of the parish church of Hanwell, and words were relied upon as seeming to intimate the opinion of the Judge that in that case the church had lost entirely its sacred character, and would require to be re-consecrated.

The note of this case, which is a very short one, must be accurately looked at for the purpose of seeing what was the nature of the application, and the question which the Court was called upon to decide. The application was by a parishioner for a faculty to make a burial-place for himself and his family in the parish church, to the exclusion of others. At the time of the application, the note goes on to say, there was no parish church, the old church having been almost entirely taken down, and a new one in the course of rebuilding.

Now an application for a faculty to make a burial-place is one the propriety of which it would be impossible to determine until it was ascertained what was the area of the church, and in what manner the interior of the church would have to be arranged and disposed of.

Dr. Lushington's answer to the application was this: "I cannot grant such a faculty. How can I grant a faculty for a church not built?" And the answer appears to us to have been a very conclusive one to that application.

Then words are attributed to the learned Judge which could hardly have been used by him as they are here reported; but if they were so used, they were *obita dicta*, not necessary for the case before him. He is reported to have said, "If the altar has been taken down, there must be a re-consecration, as my jurisdiction depends entirely *ratione loci*." If the learned Judge used those words, it is quite clear he must have borrowed them from the equivalent expressions which are found in John de Burgh and other writers at a period anterior to the Reformation, and intended to apply wholly to Roman Catholic churches. In a Roman Catholic church there is an altar, or place where the priest offers sacrifice; in a Protestant church there is no altar, in the same sense; but there is a Communion-table on which bread and wine are placed, that the parishioners may come round it to partake of the Sacrament—the Supper of our Lord.

It is impossible to derive from language applicable to a Roman Catholic altar a conclusion of law applicable to a Protestant church, which conclusion cannot be drawn unless you hold the Communion-table to be in all respects equivalent to the altar of a Roman Catholic church.

The note afterwards goes on to say that the motion was renewed subsequently: and "the church having been rebuilt and consecrated, the faculty was granted." It is impossible to tell (if it be correct that there was a re-consecration of the church) what were the circumstances which induced the supposed necessity for that re-consecration. We cannot accept the language as amounting to a judicial determination that when, in the repair of a church, a new Communion-table is put in the place of an old one, the church must be re-consecrated.

But that brings us back to the inquiry (which is one of fact), has this church been rebuilt in the sense in which the word rebuilding must be taken to be used whenever reference is made to the re-consecration of a church that has been rebuilt?

We repeat that this was not the rebuilding of an entire church, but was the renewal of a portion only; that it was done under the authority of the diocesan as matter of reparation, and not of rebuilding, and that there remained untouched an important portion of the original consecrated structure, in which the offices of a parish church still continued, without interuption, to be performed.

Upon these grounds, therefore, their Lordships act; and, confining their decision to the objection to jurisdiction, they found it upon the fact that there was no rebuilding of this church, that it is not a new church, but part of an old church, with new buildings introduced into it by way of repair; and, finding this was done by the authority of the diocesan, under a legal faculty for the purpose, they are of opinion that the church never ceased to be a parish church so as to require re-consecration, but remained subject to the authority of the diocesan. They decide, therefore, that the protest against the jurisdiction in the Court below was rightly and properly overruled.

The point remains upon the nature of the case, as stated by the respondent in the libel.

Their Lordships have no doubt, from the manner in which the title of the respondent is pleaded in the libel, that it will, when it is substantiated, give him in law a good right to the enjoyment of this pew. It is a pew in the chancel, which legally may belong to a person in respect of the ownership of a house, or which may belong to a lay rector; it is very different from a pew in the body of the church, which can only be acquired by virtue of a faculty, or by virtue of immemorial possession, i. e. by prescription, which is founded on the notion of there having originally been a faculty. Their Lordships think, therefore, there would be no weight in the objection made in point of law, even if it were at present capable of being raised by the appellant, from the course which was taken in the Court below: but we find that no such point was raised in the Court below; no objection on that ground was urged upon the Judge in the Court below; the only question which was argued there was the question which is raised by the plea of the appellant, viz. the plea alleging want of jurisdiction, which, we think, was properly overruled.

We cannot imagine any thing more dangerous or more deplorable than to come to the conclusion which the reverend appellant, who has for three years been the Incumbent of this church, seems not to be reluctant to arrive at, viz. that this fabric has been for the last forty years an unconsecrated place, in which the rites of the Church have not been duly performed,—in which, therefore, all that has been done would, in all probability, be legally good for nothing; notwithstanding that successive diocesans, notwithstanding that all anterior incumbents, notwithstanding that the whole of the parishioners have been led to believe, and have believed, that the church needed no re-consecration; that when it was repaired it could be re-occupied and restored to its original purposes without the necessity of that solemnity. We are happily able to arrive, without difficulty, at the conclusion that there was no need of such a ceremony. We regret that such a question should have been raised by the appellant, and we shall advise Her Majesty to reject his Appeal, and condemn him in costs.

I may add one thing to avoid the possibility of its being supposed that any word has been used in this place in a manner irreverent or contrary to the doctrine of the Church. In speaking yesterday of the usage of dedicating churches to Saints, or to God the Son or God the Holy Ghost, I spoke of the second and third Persons in the Trinity, using, inaccurately, the word "inferior;" I meant only that they are named second and third in the enumeration of Persons. We all know the doctrine of the Church is that the three Persons of the Trinity are co-equal and co-eternal, and nothing different was intended to be implied by the expression so inaccurately used. I meant only to express that, when you speak of the Persons of the Trinity, you say God the Father, God the Son, and God the Holy Ghost,—God the Son and God the Holy Ghost being necessarily named second and third in order, but without implying any inferiority. I mention this because I have been informed the expression was misunderstood, and I am anxious there should be no misunderstanding on such a subject.

In the following case the Judicial Committee of the Privy Council was constituted under the General Law, consequently no Spiritual person sat upon the tribunal.

MEM.—The Judgment of the Master of the Rolls (who was himself a member of this Judicial Committee, and was present at the delivery of its judgment) subsequently given in the Rolls Court on Dr. Colenso's case, is printed here in parallel columns, in order that a convenient opportunity may be afforded for the exercise of the reader's ingenuity, should he see fit to make any endeavours towards reconciling the two judgments. For an exercise of the like ingenuity opportunities will also, in some instances, be afforded for comparing each of the judgments with itself. The reader, meanwhile, is requested to remember that the object of the first judgment was to disable the Letters Patent of the Crown as giving the Metropolitan of South Africa jurisdiction over Dr. Colenso—of the second to uphold those instruments as giving Dr. Colenso a right to the enjoyment of his pecuniary income. The arguments employed in both are highly interesting, the methods of reasoning employed still more highly instructive.

Judgment of the Lords of the Judicial Committee of the Privy Council in the matter of the Petition of Complaint of the Right Rev. John William Colenso, D. D., Lord Bishop of Natal, delivered 20th March, 1865.

Present:—The Lord Chancellor (Lord Westbury); Lord Cranworth; Lord Kingsdown; the Master of the Rolls (Sir John Romilly); Right Hon. Dr. Lushington.

THE LORD CHANCELLOR,—

The Bishop of Natal and the Bishop of Capetown (who are the parties to this proceeding) are ecclesiastical persons who have been created Bishops by the Queen[1], in the exercise of her authority as Sovereign of this realm and *Head of the Established Church.*

These Bishops were consecrated under mandate from the Crown by the Archbishop of Canterbury, in the manner prescribed by the law of England.

They received and hold their dioceses under grants made by the Crown[2]. Their status, therefore, both ecclesiastical and temporal, must be ascertained and defined by the law of England; and it is plain that their legal existence depends on Acts which have no validity or effect, except on the basis of the supremacy of the Crown.

[1] Compare p. 193, col. 2, l. 32.
[2] Compare p. 193, col. 1, l. 23.

Judgment of the Master of the Rolls in the case of "Colenso v. *Gladstone and others," delivered 6th November,* 1866.

LORD ROMILLY,—

This is a suit instituted by John William Colenso, claiming to be Bishop of Natal, against the Trustees of the Colonial Bishoprics Fund, praying that the annual income of the fund appropriated for the endowment of the Bishopric of Natal may be paid to him. The defendants do not deny that the plaintiff is in some sense Bishop of Natal: the defence is, in substance, that no legal Diocese of Natal has been created, that the title of Bishop of Natal conferred on the plaintiff is little more than nominal, that the funds entrusted to the defendants were subscribed for the endowment of a Bishopric in Natal, in which the Bishop was to preside over an Episcopal Church identical with the United Church of England and Ireland, and where the Bishop had legal jurisdiction according to the principles of the English Ecclesiastical Law. They contend that

Further their respective and relative rights and liabilities must be determined by the principles of English law applied to the construction of the grants to them contained in the Letters Patent; for they are the creatures of English law[1], and dependent on that law for their existence, rights, and attributes.

We must treat the parties before us as standing on this foundation, and on no other.

The Letters Patent by which Dr. Gray was appointed Bishop of Capetown and also Metropolitan, passed the Great Seal on the 8th of December, 1853. These Letters Patent recited, among other things, that it had been represented to Her Majesty by the Most Reverend Father in God John Bird, by Divine Providence Lord Archbishop of Canterbury, that the then existing See or Diocese of Capetown was of inconvenient extent, and "that for the due spiritual care and superintendence of the religious interests of the inhabitants thereof, and for the maintenance of the doctrine and discipline of the United Church of England and Ireland within our said Colony of the Cape of Good Hope and its dependencies, and our Island of Saint Helena," it was desirable and expedient that the same should be "divided into three (or more) distinct and separate Sees or Dioceses, to be styled the Bishopric of Capetown, the Bishopric of Grahamstown, and the Bishopric of Natal—the Bishops of the said several Sees of Grahamstown and Natal and their successors to be subject and subordinate to the See of Capetown, and to the Bishop thereof and his successors, in the same manner as any Bishop of any See within the Province of Canterbury was under the authority of the Archiepiscopal See of that Province and the Archbishop of the same;" and the Letters Patent contained the following pasages:—

[1] Compare p. 193, col. 2, l. 32.

this object has wholly failed, for that by recent decisions of the Privy Council it has been established that the person on whom has been conferred the title of Bishop of Natal can exercise none of these functions. Such is a short outline of the defence pleaded by the defendants. It will be necessary for me, in order to arrive at a satisfactory determination in this case, to consider, in the first place, what the duties and functions of a Bishop of the Church of England are.

In the second place, to what extent the Letters Patent of the Crown have failed in enabling the plaintiff to perform these duties and to exercise these functions within the Colony of Natal, having regard to the law as declared by the decisions of the Privy Council in the case of "Long *v.* the Bishop of Capetown," and in the case of the Petition of the Bishop of Natal against the sentence of the Bishop of Capetown, and which was referred by Her Majesty to the Judicial Committee of the Privy Council; and to arrive at a satisfactory conclusion on the subject, it will be necessary to examine what is the real position of these Churches in the Colonial dependencies on the Crown of England.

In the third place, it will be necessary to ascertain the objects for which the funds in the hands of the defendants were contributed, the nature and extent of the contract entered into by the contributors of these funds with the Crown and with the plaintiff when he was appointed Bishop of Natal, and whether, having regard to these matters, or any of them, the defendants are bound to withhold from the plaintiff or to pay to him the funds entrusted to their administration.

The facts which raise these questions are very few, and not in dispute. They are as follows:—

In 1841 the Archbishop of Canter-

"And we do further will and ordain that the said Right Reverend Father in God, Robert Gray, Bishop of the said See of Capetown, and his successors the Bishops thereof for the time being, shall be, and be deemed and taken to be, the Metropolitan Bishop in our Colony of the Cape of Good Hope and its dependencies, and our Island of Saint Helena, subject, nevertheless, to the general superintendence and revision of the Archbishop of Canterbury for the time being, and subordinate to the Archiepiscopal See of the Province of Canterbury: and we will and ordain that the said Bishops of Grahamstown and Natal respectively shall be Suffragan Bishops to the said Bishop of Capetown and his successors. And we will and grant to the said Bishop of Capetown and his successors full power and authority as Metropolitan of the Cape of Good Hope, and of the Island of St. Helena, to perform all functions peculiar and appropriate to the office of Metropolitan within the limits of the said Sees of Grahamstown and Natal, and to exercise Metropolitan jurisdiction over the Bishops of the said Sees and their successors, and over all Archdeacons, Dignitaries, and all other Chaplains, Ministers, Priests, and Deacons in Holy Orders of the United Church of England and Ireland within the limits of the said Dioceses. And we do by these presents give and grant unto the said Bishop of Capetown and his successors full power and authority to visit once in five years, or oftener, if occasion shall require, as well the said several Bishops and their successors, as all Dignitaries, and other Chaplains, Ministers, Priests, and Deacons in Holy Orders of the United Church of England and Ireland resident in the said Dioceses, for correcting and supplying the defects of the said Bishops and their successors, with all and all manner visitorial jurisdiction, power, and coercion.

bury issued an invitation to the Clergy and laity to attend a meeting in April of that year, for the purpose of commencing the creation of a fund for the endowment of additional Bishops for the Colonies. On the 27th of April the meeting was held, and four resolutions were passed, the fourth of which was in these terms:—

"4th. That a fund be raised towards providing for the endowment of Bishoprics in such of the foreign possessions of Great Britain as shall be determined upon by the Archbishops and Bishops of the United Church of England and Ireland. That their lordships be requested to undertake the charge and application of the fund, and to name a treasurer or treasurers and such other officers as may be required for conducting the necessary details."

On the Tuesday in Whitsun week following the Prelates met, according to the request so expressed, and undertook to take charge of the fund; they pointed out the dependencies on the Crown where Bishoprics were the more immediately required; they appointed a Standing Committee, consisting of the four Archbishops and five Bishops, to conduct the matter; and they concluded with stating that in no case should they proceed without the concurrence of Her Majesty's Government. Some years after this, on the 18th of May, 1849, the Standing Committee passed a resolution by which it was declared that thenceforward all the Archbishops and Bishops of the United Church of England and Ireland should form the Committee, which was thenceforth to be called the Council for Colonial Bishoprics. Treasurers were appointed for the administration of the fund to be raised for these purposes. The four first defendants on the record are the Treasurers to whom this administration is now confided. The mode in which new Bishoprics were created from time to time, as they were considered to be required, was as follows:—As soon as this Committee or

"And we do hereby authorize and empower the said Bishop of Capetown and his successors to inhibit during any such visitation of the said dioceses the exercise of all or of such part or parts of the ordinary jurisdiction of the said Bishops, or their successors, as to him the said Bishop of Capetown or his successors shall seem expedient, and during the time of such visitation to exercise by himself or themselves, or his or their commissaries, such powers, functions, and jurisdictions in and over the said dioceses as the Bishops thereof might have exercised if they had not been inhibited from exercising the same.

"And we do further ordain and declare, that if any person against whom a judgment or decree shall be pronounced by the said Bishops or their successors, or their Commissary or Commissaries, shall conceive himself to be aggrieved by such sentence, it shall be lawful for such person to appeal to the said Bishop of Capetown or his successors, provided such appeal be entered within fifteen days after such sentence shall have been pronounced.

"And we do give and grant to the said Bishop of Capetown and his successors full power and authority finally to decree and determine the said appeals.

"And we do further will and ordain[1] that in case any proceeding shall be instituted against any of the said Bishops of Grahamstown and Natal, when placed under the said Metropolitical See of Capetown, such proceedings shall originate and be carried on before the said Bishop of Capetown, whom we hereby authorize and direct to take cognizance of the same.

"And if any party shall conceive himself aggrieved by any judgment, decree, or sentence pronounced by the said Bishop of Capetown or his successors, either in case of such review

[1] Compare p. 210, l. 29.

Council for Colonial Bishoprics came to the conclusion that it would be expedient to found a Bishopric in any particular colony, and had ascertained that they possessed funds sufficient in their opinion for the due maintenance of the Bishop of such intended Diocese, they communicated with her Majesty's Government on the subject, whose assent being obtained, thereupon the Committee or the Council entered into an agreement with the Crown, through her Ministers, that a certain annual income, then specified, should be appropriated out of the proceeds of the Colonial Bishoprics Fund for the use of such Bishop. Her Majesty thereupon granted Her Letters Patent, purporting to create the Diocese required, and then appointed some Priest to be ordained and consecrated as the Bishop of such Colonial Diocese.

It was in this manner that the Colony of the Cape of Good Hope and its dependencies were, in September, 1847, constituted a Bishop's See and Diocese.

Early in March, 1853, the Council for Colonial Bishoprics resolved to obtain the creation of four new Bishoprics, one of which was to include the Eastern Province of the Cape Colony, and to be termed the Bishopric of Grahamstown, and another was to include the Province of Natal. Accordingly, for this purpose, on the 22nd of June, 1853, Mr. Hawkins, the Secretary of the Council, addressed a letter to the Secretary of State for the Colonies in the following terms:—

"79, Pall Mall, 22nd June, 1853.

"My Lord Duke,—I am directed by the Council for Colonial Bishoprics to inform you that they have appropriated and are prepared to invest a capital sum of £10,000 for the endowment of the proposed Bishopric in the Colony of Natal, and I am further to express a hope that measures may be taken without delay for the erection of the See in question.

"I have, &c.,

"Ernest Hawkins.

"To his Grace the Duke of Newcastle."

or in any cause originally instituted before the said Bishop or his successors, it shall be lawful for the said party to appeal to the said Archbishop of Canterbury or his successors, who shall finally decide and determine the said appeal."

The Letters Patent which constituted the See of Natal and appointed the appellant to that See were sealed, and bear date on the 23rd of November, 1853, fifteen days before the grant of the Letters Patent to the Bishop of Capetown.

The Letters Patent creating the See of Natal recited the Patent of September, 1847, which created the original Diocese of Capetown, and appointed Dr. Gray the Bishop thereof, and that he had since resigned the the office of Bishop of Capetown, whereby the said See had become, and was then, vacant. The patent also recited that it was expedient and desirable that the said Diocese should be divided into three or more distinct and separate Dioceses, to be styled the Bishoprics of Capetown, Grahamstown, and Natal, the Bishops of the said several Sees of Grahamstown and Natal to be subject and subordinate to the See of Capetown, and the Bishop thereof and his successors, in the same manner as any Bishop of any See within the Province of Canterbury was under the authority of the Archiepiscopal See of that Province and the Archbishop of the same; and the Letters Patent proceeded to erect, found, make, ordain, and constitute the district of Natal to be a distinct and separate Bishop's See and Diocese, to be called the Bishopric of Natal. And after appointing Dr. Colenso to be the Bishop of the said See, and granting that the said Bishop of Natal and his successors should be a body corporate, the Letters Patent contained the following passage:—

"And we do further ordain and declare that the said Bishop of Natal and his successors shall be subject

In July, 1853, the Society for the Propagation of the Gospel suggested the propriety of increasing the endowment of these two Bishoprics, which was done by a resolution of the Council in these terms:—

"That it was the opinion of the Society that it was extremely desirable that some assistance should be granted from the general funds of the Society towards increasing the income of the Bishops of Grahamstown and Natal during the first years of their Episcopate, and that, therefore, it be referred to the Standing Committee to consider whether the sum of £300 a year might properly be granted to the new Sees of Grahamstown and Natal for the term of five years."

On the 23rd of November, 1853, the Letters Patent creating the See and Diocese of Natal issued under the Great Seal. They were to this effect:—They recited the Letters Patent creating the See or Diocese of Capetown, the resignation of Dr. Gray, the Bishop whereby the See or Diocese had become vacant; they recited the expediency of dividing that See or Diocese into three distinct Sees, to be styled Capetown, Grahamstown, and Natal; they then proceeded to constitute the district of Natal into a distinct and separate See and Diocese, and commanded the Archbishop of Canterbury to ordain and consecrate the plaintiff to be Bishop of the said See and Diocese. The Letters Patent then proceeded in these words:—

"And we do hereby signify to the Most Reverend Father in God, John Bird, by Divine Providence Lord Archbishop of Canterbury, Primate of All England, and Metropolitan, the creation and constitution of the said See and Diocese, and our nomination of the said John William Colenso, requiring, and by the faith and love whereby he is bound unto us commanding the said Most Reverend Father in God to ordain and consecrate the said John William Colenso to be Bishop of the said See and Diocese in manner accustomed, and diligently to do and perform all other things appertaining to his office in this behalf with effect. And we do ordain

and subordinate to the See of Capetown, and to the Bishop thereof and his successors, in the same manner as any Bishop of any See within the Province of Canterbury, in our Kingdom of England, is under the authority of the Archiepiscopal See of that Province, and of the Archbishop of the same: and we do hereby further will and ordain that the said John William Colenso, and every Bishop of Natal, shall, within six months after the date of their respective Letters Patent, take an oath of due obedience to the Bishop of Capetown, for the time being, as his Metropolitan, which oath shall and may be administered unto him by the said Archbishop, or by any person by him duly appointed or authorized for that purpose."

The Letters Patent then proceeded to confer on the Bishop of Natal and his successors, Episcopal jurisdiction and authority over all Rectors, Curates, Ministers, Chaplains, Priests, and Deacons within the Diocese, and directed that, if any party should conceive himself aggrieved by any judgment, decree, or sentence pronounced by the Bishop of Natal or his successors, he should have an appeal to the Bishop of Capetown, who should finally decide and determine the appeal.

Under these Letters Patent, the appellant was consecrated on the 30th of November, 1853, and he took an oath of canonical obedience[1] to the Metropolitan Bishop of Capetown, which oath was administered to him by the Archbishop of Canterbury, and was in these words: "I, John William Colenso, Doctor in Divinity, appointed Bishop of the See and and Diocese of Natal, do profess and promise all due reverence and obedience to the Metropolitan Bishop of Capetown and to his successors, and to the Metropolitan Church of St. George, Capetown." At this time

[1] Compare p. 196, col. 1, l. 31.

and declare that the said John William Colenso, so by us nominated and appointed, after having been ordained and consecrated as, aforesaid, may by virtue of such appointment and consecration, enter into and possess the said Bishop's See as the Bishop thereof without let or impediment from us, our heirs and successors, for the term of his natural life, subject nevertheless to the right of resignation hereinafter more particularly expressed, saving nevertheless unto us, our heirs and successors, the power of altering from time to time, with the consent of the Archbishop of Canterbury for the time if the said See be vacant or otherwise with the consent of the said Archbishop and of the Bishop of the said See for the time being, the limits of the said Diocese or of the jurisdiction of the Bishop thereof."

After this they constituted the Bishop of Natal a body corporate, and proceeded thus:—

"And we do further ordain and declare that the said Bishop of Natal and his successors shall be subject and subordinate to the See of Capetown, and to the Bishop thereof and his successors, in the same manner as any Bishop of any See within the Province of Canterbury in our Kingdom of England, is under the authority of the Archiepiscopal See of that Province and of the Archbishop of the same. And we do hereby further will and ordain that the said John William Colenso and every Bishop of Natal shall, within six months after the date of their respective Letters Patent, take an oath of due obedience to the Bishop of Capetown for the time being as his Metropolitan, which oath shall and may be ministered unto him by the said Archbishop, or by any person by him duly appointed or authorized for that purpose; and we do further by these presents expressly declare that the said Bishop of Natal, and also his successors, having been respectively by us, our heirs and successors, named and appointed, and by the said Archbishop of Canterbury canonically ordained and consecrated according to the form of the United Church of England and Ireland, may perform all the functions peculiar and appropriate to the office of Bishop within the said Diocese of Natal. And for a declaration of the spiritual causes or matters in which the aforesaid jurisdiction may be more especially exercised, we do by these presents further declare that the aforesaid Bishop of Natal and his successors may exercise

there was not in reality any Metropolitan See of Capetown, or any Bishop thereof in existence.

These several Letters Patent were not granted in pursuance of any Orders or Order made by Her Majesty in Council, nor were they made by virtue of any Statute of the Imperial Parliament, nor were they confirmed by any Act of the Legislature of the Cape of Good Hope or of the Legislative Council of Natal.

Previously to these Letters Patent being granted the District of Natal had been erected into a distinct and separate Government; and, by Letters Patent granted by the Crown in 1847, it was ordained that it should have a Legislative Council which should have power to make such laws and ordinances as might be required for the peace, order, and good government of the district. With respect to the Cape of Good Hope, by Letters Patent, dated the 23rd of May, 1858, it was declared and ordained by Her Majesty, that there should be within the settlement of the Cape of Good Hope a Parliament which should be holden by the Governor, and should consist of the Governor, a Legislative Council, and a House of Assembly, and that such Parliament should have authority to make laws for the peace, welfare, and good government of the settlement.

In the year 1863, certain charges of heresy and false doctrine were preferred against the appellant before the Bishop of Capetown as Metropolitan, and upon these charges the Bishop of Capetown, claiming to exercise jurisdiction as Metropolitan, did, on the 16th day of December, 1863, sentence, adjudge, and decree the appellant, the Bishop of Natal, to be deposed from his office as such Bishop, and to be further prohibited from the exercise of any divine office within any part of the Metropolitan Province of Capetown. In pronouncing this decree, the Bishop of Capetown said:—"I do hereby pronounce, decree, and declare that the said Robert Gray, Bishop of Natal, has been duly cited to appear before me, and has failed to appear, and that he has been duly called upon to answer the charges, and has failed to answer the same, and that he has been duly admonished, and has failed to submit himself to the jurisdiction of this Court, and that he is in contempt, and that he has been duly pronounced contumacious and in contempt, and that he has been duly excommunicated, and has failed to obtain absolution, and that he has been duly declared excommunicate, and that he has been duly declared excommunicate and deposed from his office as Bishop, and that he has been duly declared excommunicate, deposed, and degraded from his office as Bishop, and that he has been duly declared excommunicate, deposed, degraded, and removed from his office as Bishop, and that he has been duly declared excommunicate, deposed, degraded, removed, and prohibited from the exercise of any divine office within any part of the Province of Capetown, and that he has been duly declared excommunicate, deposed, degraded, removed, prohibited, and suspended from all and every the rights, profits, benefices, and emoluments thereunto belonging or appertaining, and that he has been duly declared excommunicate, deposed, degraded, removed, prohibited, suspended, and deprived of all and every the rights, profits, benefices, and emoluments thereunto belonging or appertaining, and that he has been duly declared excommunicate, deposed, degraded, removed, prohibited, suspended, deprived, and disabled from having, holding, or enjoying any rights, profits, benefices, or emoluments whatsoever within the Province of Capetown, and that he has been duly declared excommunicate, deposed, degraded, removed, prohibited, suspended, deprived, disabled, and rendered incapable of having, holding, or enjoying full power and authority, by himself or themselves, or by the Archdeacon or Archdeacons, or the Vicar-General or other officer or officers hereinafter mentioned, to give institution to benefices, to grant licences to officiate to all Rectors, Curates, Ministers, and Chaplains of all the churches or chapels, or other places within the said Diocese, wherein divine service shall be celebrated according to the rites and Liturgy of the Church of England, and to visit all Rectors, Curates, Ministers, and Chaplains, and all Priests and Deacons in Holy Orders of the United Church of England and Ireland resident within the said Diocese, and also to call before him or them, or before the Archdeacon or Archdeacons, or the Vicar-General or other officer or officers hereinafter mentioned, at such competent days, hours, and places when and so often as to him or them shall seem meet and convenient, the aforesaid Rectors, Curates, Ministers, Chaplains, Priests, and Deacons, or any of them, and to inquire as well concerning their morals as their behaviour in their said office and stations respectively, subject nevertheless to such rights of review and appeal as are hereinafter given and reserved."

From the period when this took place the sum of £362. 10s., being the interest of the £10,000., reduced to that amount by the payment of two sums out of the Colonial Bishoprics Fund for the use of the Bishop of Natal, and the sum of £300. additional, in pursuance with the resolution of the 26th of July, 1852, making together the sum of £662. 10s., have been regularly paid to the plaintiff up to and including the 5th of April, 1864. Since that time this sum has been carried to a separate account.

In May, 1863, a charge was made against the plaintiff that he had been guilty of false and erroneous teaching and doctrine by the publication of certain books within the Province of Capetown, and the plaintiff was cited to appear and answer the charge before the Bishop of Capetown on the 17th of November, 1863.

town claimed to exercise jurisdiction as Metropolitan, by virtue of his Letters Patent, and of the office thereby conferred on him, and as having thereby acquired legal authority to try and condemn the appellant; and the appellant protested against such assumption of jurisdiction.

This sentence and decree of Dr. Gray, as Metropolitan, has been published and promulgated in the Diocese of Natal, and the Clergy of that Diocese have been thereby prohibited from yielding obedience to the appellant as Bishop of Natal.

In this state of things three principal questions arise, and have been argued before us: First, were the Letters Patent of the 8th of December, 1853, by which Dr. Gray was appointed Metropolitan, and a Metropolitan See or Province was expressed to be created, valid and good in law? Secondly, supposing the ecclesiastical relation of Metropolitan and Suffragan to have been created, was the grant of coercive authority and jurisdiction expressed by the Letters Patent to be thereby made to the Metropolitan valid and good in law? Thirdly, can the oath of canonical obedience taken by the appellant to the Bishop of Capetown, and his consent to accept his See as part of the Metropolitan Province of Capetown, confer any jurisdiction or authority on the Bishop of Capetown by which this sentence of deprivation of the Bishopric of Natal can be supported?

With respect to the first question, we apprehend it to be clear, upon principle, that after the establishment of an independent Legislature in the Settlements of the Cape of Good Hope and Natal, there was no power in the Crown by virtue of its Prerogative (for these Letters Patent were not granted under the provisions of any Statute) to establish a Metropolitan See or Province[1], or to create an Ecclesiastical Corporation whose sta-

[1] Compare p. 213, l. 33.

The plaintiff by his agent, Dr. Bleek, protested against the exercise of any jurisdiction over him by the Bishop of Capetown, who nevertheless investigated the charges against the plaintiff as his Metropolitan, and pronounced a sentence of deprivation against him on the 16th of December, 1863.

On the 15th of April, 1864, the Bishop of Capetown wrote to the Secretary of the Council of Colonial Bishoprics, communicating the sentence he had pronounced, and requesting that they would cease to pay the interest of any endowment to the Bishop.

The plaintiff presented a petition of complaint and appeal to Her Majesty against the proceedings and sentence of the Bishop of Capetown. Her Majesty referred the matter to the Judicial Committee of the Privy Council, who, after hearing Counsel for the plaintiff and for the Bishop of Capetown, made their report on the 20th of March, 1865, in which they reported their opinion to be that the sentence pronounced by the Bishop of Capetown was null and void. On this judgment being given, the plaintiff applied to the defendants, the Trustees, for payment to him of the stipend appropriated to the Bishop of Natal as theretofore. This the defendants have declined to do. They have also declined to pay the Bishop of Capetown his salary, and their reason for so doing is expressed in the 39th paragraph of their Answer, which, as it sets forth the ground of their defence very clearly and distinctly, I think it proper to read:—

"We are advised that in accordance with the Judgment of the Judicial Committee of the Privy Council, the said Letters Patent of the 23rd day of November, 1853, are to be considered null and void so far as they purport to create any Diocese, or to confer any legal jurisdiction or authority on the plaintiff, and that the plaintiff has no power to exercise the functions of a Bishop in the Colony of

tus, rights, and authority the colony could be required to recognize.

After a Colony or Settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or Settlement as it does to the United Kingdom.

It may be true that the Crown, as legal *head of the Church*, has a right to command the consecration of a Bishop, but it has no power to assign[1] him any Diocese, or give him any sphere of action within the United Kingdom. The United Church of England and Ireland is not a part of the Constitution in any Colonial Settlement, nor can its authorities or those who bear office in it claim to be recognized by the law of the Colony, otherwise than as the members of a voluntary association.

The course which legislation has taken on this subject is a strong proof of the correctness of these conclusions. In the year 1813 it was deemed expedient to establish a Bishopric in the East Indies (then under the Government of the East India Company), and although the Bishop was appointed and consecrated under the authority of the Crown, yet it was thought necessary to obtain the sanction of the Legislature, and that an Act of Parliament should be passed to give the Bishop legal status and authority. Accordingly, by Statute, 53rd Geo. III. c. 155, sec. 49, it was enacted that in case it should please His Majesty, by his Royal Letters Patent, to erect, found, and constitute one Bishopric for the whole of the British territories in the East Indies and parts therein mentioned, a certain salary should be paid to the Bishop by the East India Company, and by the 51st and 52nd sections it was enacted that such Bishop should not have or use any jurisdiction, or exercise any Episcopal functions whatsoever but

[1] Compare p. 192, col. 2. l. 24.

Natal, or at all events has no jurisdiction as a Bishop in that colony, and is not himself subject, as by the said Letters Patent affecting to create the said Bisbopric he was intended to be made subject, to the jurisdiction of the Bishop of Capetown as his Metropolitan, or to any other Spiritual or Ecclesiastical jurisdiction whatsoever; and we submit that if such is the case, then the objects set forth in the declaration referred to in the third paragraph of the said Bill, and for which the funds hereinbefore mentioned were invested and subscribed, have not been obtained, which objects were in the first place to secure the pastoral care of a Bishop for the clergy and people of the Diocese of Natal, and in the second place to bring such Bishop under the jurisdiction of a Metropolitan, as in the Church at home, such Metropolitan being himself subject to the authority of the Archbishop of Canterbury, and we declare our belief that none of the contributors to the Colonial Bishoprics Fund intended to subscribe towards the support of a Bishop such as the Judgment of the said Judicial Committee of Her Majesty's Privy Council has decided the plaintiff to be—that is to say, a Bishop without any jurisdiction over his clergy on the one hand, and entirely independent of all Metropolitan jurisdiction on the other; and as evidence thereof we especially crave leave to refer to a letter addressed by Miss Burdett Coutts to this defendant, the Archbishop of Canterbury, dated the 12th day of July, 1865, and received since this our answer was prepared, which letter we are ready to produce to the plaintiff or his solicitors."

These are all the facts which I think are necessary to be referred to in order to explain the character of the questions which are raised, and which I have to determine.

Before proceeding to consider the propositions which, in my opinion, must be decided in order to arrive at the ultimate conclusion whether the plaintiff is or is not entitled to the relief he asks, it will be convenient that I should state the questions which, in my opinion, I have not to consider; and, first of all, I have not to consider whether the plaintiff, by false and erroneous teaching or doc-

such as should be limited to him by Letters Patent, and that it should be lawful for His Majesty by Letters Patent to grant to such Bishop such Ecclesiastical jurisdiction and the exercise of such Episcopal functions within the East Indies and parts aforesaid as His Majesty should think necessary for administering holy ceremonies, and for the superintendence and good government of the Ministers of the Church Establishment within the East Indies and parts aforesaid. Subsequently, in the year 1833, it was deemed right to found two additional Bishoprics, one at Madras, and the other at Bombay; and again an Act of Parliament (3 and 4 Will. IV. c. 85) was passed, by the 93rd section of which it was enacted, in like manner, that the Crown should have power to grant such Bishops within their dioceses Ecclesiastical jurisdiction; and it was also enacted and declared that the Bishop of Calcutta should be Metropolitan in India, and should have, as such, all such jurisdiction as the Crown should by Letters Patent direct, subject, nevertheless, to the general superintendence and revision of the Archbishop of Canterbury; and it was provided that the Bishops of Madras and Bombay should be subject to the Bishop of Calcutta as Metropolitan, and should take an oath of canonical obedience to him.

So again, when in 1824 a Bishop was appointed in Jamaica by Letters Patent containing clauses similar to those which are found in the Letters Patent to the present appellant, it was thought necessary that the legal status and authority of the Bishop should be confirmed and established by an Act of the Colonial Legislature. The consent of the Crown was given to this Colonial Act, which would have been an improper thing, as an injury to the Crown's prerogative, unless the Law advisers of the Government had been satisfied that the Colonial Statute was necessary to give full effect to the establishment of the Bishopric.

trine, or in other manner, has misconducted himself as a Bishop. I have nothing to do with the question whether his works have or have not an heretical tendency. That question might have been raised, and might have had an important bearing on the question whether the plaintiff is or is not entitled to be paid the salary in question; but that question not only is not raised, but it seems to have been on both sides carefully excluded from the pleadings. I must, therefore, in dealing with the questions in this case, proceed on the assumption, that neither in respect of morals, nor in respect of doctrine, is there any thing to disqualify the plaintiff from acting as Bishop of Natal. In the second place, I have not to consider whether the Letters Patent creating the Diocese of Natal, and appointing the plaintiff the Bishop thereof, are or not wholly null and void[1]. That question may be tried before some other tribunal, or in some other cause in which their validity may be challenged, but it cannot be tried in this suit as at present constituted. What I have now to consider is the force and effect[2] of these Letters Patent, as between the trustees who obtained the grant, the plaintiff to whom it was made, and the members of the Church of England in the Colony of Natal, who have accepted or submitted to it: and, in doing so, I have to consider whether, with reference to the law of England on this subject as expounded by the Judicial Committee of the Privy Council, these Letters Patent do not attempt to confer powers which the Crown has no legal power or authority to confer. Whether it is true, adopting the words of Dr. Gray, the Bishop of Capetown, used by him in February, 1851, in one of the documents in evidence in this cause, that whatever may be their general validity, so far as their

[1] Compare below, l. 31.
[2] Compare above, l. 24.

The conclusion is further confirmed by observing the course of Imperial legislation on the same subject, namely the creation of new Bishoprics in England.

When four new Bishoprics were constituted by Henry VIII., it appears to have been thought necessary, even by that absolute Monarch, to have recourse to the authority of Parliament, and the Act that was passed (viz. the 31st Hen. VIII. c. 9, which is not found in the ordinary edition of the Statutes) is of a singular character. After referring to the slothful and ungodly life which had been used among all those which bore the name of religious folk, and reciting that it was thought, therefore, unto the King's Highness most expedient and necessary that more Bishoprics, Collegiate and Cathedral Churches should be established, it was enacted, that His Highness should have have full power and authority, from time to time, to declare and nominate by his Letters Patent or other writing to be made under his Great Seal, such numbers of cities, Sees for Bishops, Cathedral Churches, and Dioceses by metes and bounds, for the exercise and ministration of their Episcopal offices and administration as shall appertain, and to endow them with such possessions after such manner, form, and condition as to His Most excellent wisdom shall be thought necessary and convenient.

This Statute, which was repealed by the 1st & 2nd of Philip and Mary, c. 8, sec 18, does not appear to have been revived. It is remarkable as granting power to nominate and appoint new Bishops as well as to create new Sees and Dioceses.

So also in recent times the two new Bishoprics of Manchester and Ripon were constituted, and the new Bishops received Ecclesiastical jurisdiction under the authority of an Act of Parliament. It is true that practical efficacy is concerned, "they are worth little more than waste paper." This distinction is one of importance, and must be borne constantly in mind in this case—the Letters Patent[1] of the Crown may be generally valid, and yet be ineffectual to confer any privilege. The Sovereign may grant Letters Patent creating a new Bishopric in those places where it is not forbidden by statute—as, for instance, in one of the dependencies attached to the Crown, but the person appointed Bishop may be prevented by law from performing any of the functions proper to be performed by a Bishop. I must therefore examine every part of these Letters Patent, in order to ascertain to what, if any, extent they confer powers or rights which cannot legally and validly be exercised or enforced. In other words, the Letters Patent creating[2] the See or Diocese of Natal, and appointing the plaintiff the Bishop thereof, may validly make him a Bishop, and confer upon him certain powers[3] which he may legally exercise, and yet, at the same time, may also purport to give him other powers which he cannot legally exercise. If, however, this should turn out to be the fact, the circumstance that such excess of power is attempted to be conferred in and by the Letters Patent does not render them wholly invalid, or vitiate that portion of them which confers powers which may be legally exercised. The purport and effect of these Letters Patent I have already stated in detail: in order to determine their legal efficacy it is necessary to notice what it is they have effected, and how far this falls short of what they have attempted to effect. They have appointed the plaintiff Bishop of Natal; they have commanded the Archbishop of Canterbury to consecrate the plaintiff

[1] Compare p. 193, col. 1, l. 14.
[2] Compare p. 190, col. 1, l. 13.
[3] Compare p. 193, col. 1, l. 24.

it has been the practice for many years to assert in Letters Patent creating Colonial Bishoprics, clauses which purport to confer Ecclesiastical jurisdiction; but the forms of such Letters Patent were probably taken by the official persons who prepared them from the original forms used in the letters Patent appointing the East Indian Bishops, without adverting to the fact that such last-mentioned Letters Patent were granted under the provisions of an Act of Parliament.

We therefore arrive at the conclusion[1] that although in a Crown colony, properly so called, or in cases where the Letters Patent are made in pursuance of the authority of an Act of Parliament (such for example as the Act of the 6th & 7th Vict. c. 13), a Bishopric may be constituted and Ecclesiastical jurisdiction conferred by the sole authority of the Crown yet that the [2]Letters Patent of the Crown will not have any such effect or operation in a colony or settlement which is possessed of an independent legislature.

The subject was considered by the Judicial Committee in the case of "Long *v.* the Bishop of Capetown" (1 Moore's P.C. Cases, N.S. 411), and we adhere to the principles which are there laid down.

The same reasoning is of course decisive of the second question, whether any jurisdiction was conferred by the Letters Patent. Let it be granted or assumed that the Letters Patent are sufficient in law to confer on Dr. Gray the Ecclesiastical status of Metropolitan, and to create between him and the Bishops of Natal and Grahamstown the personal relation of Metropolitan and Suffragan as Ecclesiastics, yet it is quite clear that the Crown had no power to confer any jurisdiction or coercive legal authority[3] upon the Metropolitan over the Suffragan such Bishop; the Archbishop of Canterbury has accordingly done so. The first question is, What is the effect of this? It is not disputed, and indeed it could not be disputed, that the nomination by the Crown of the plaintiff and his consecration by the Archbishop of Canterbury have conferred upon him the title and dignity of a Bishop of the Church of England, and also that he is thereby invested with all the powers and authority incidental to the office of Bishop, so far as such powers and authority can be exercised without coercive legal jurisdiction over his clergy.

In all the works that I have consulted on this subject the powers and and authority of a Bishop are classed under three heads:—1. *Ordo;* 2. *Jurisdictio;* 3. *Administratio rei familiaris.* The Letters Patent of the Crown profess to give the two first of these powers[1]; they do not profess to give the third.

The first, which is the power of Orders, he derives from consecration[2], which, according to the doctrine of the Catholic Church of Christ, of which the Church of England is a branch, is a sacred authority, derived by direct descent from the Apostles.[3] By this power so conferred upon him he may transmit the spiritual power he possesses to others; he can ordain Deacons and Priests; he can consecrate and dedicate churches; he can administer Confirmation. This is the first and most important class of powers which a Bishop possesses. These powers are not confined to this or that spot, but are universal. They extend over the whole world. But this, it is alleged, makes him only a titular Bishop, and not a territorial Bishop, for that by this he has no see or diocese attached to his office. In order to consider the force and value of this remark it is desirable

[1] Compare p. 192, col. 2, l. 6.
[2] Compare p. 182, col. 1, l. 16; and p. 192, col. 2, l. 28; and p. 213, l. 33.
[3] Compare p. 198, col. 2, l. 8, and l. 15.

[1] Compare next sentence.
[2] Compare previous sentence.
[3] Compare p. 182, l. 6, 183, l. 7, and p. 207, l. 12.

gan Bishops, or over any other person.

It is a settled constitutional principle or rule of law, that although the Crown may by its Prerogative establish Courts to proceed according to the Common Law, yet that it cannot create any new Court to administer any other law; and it is laid down by Lord Coke in the 4th Institute, that the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament.

It cannot be said that any Ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no Established Church[1], and in the case of a settled colony the Ecclesiastical Law of England cannot, for the same reason, be treated as part of the law which the settlers carried with them from the mother country.

So much of the Letters Patent now in question as attempts to confer any coercive legal jurisdiction is also in violation of the law as declared and established by that part of the Act of the 16th Car. I. c. 11, which remains unrepealed by the 13th Car. II. St. II., c. 12. It may be useful to state this is in detail. By the 16th and 17th sections of the 1 Eliz. c. 1, entitled "An Act to restore to the Crown the ancient jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all Foreign Powers repugnant to the same," it was enacted, that all usurped and foreign power and authority, spiritual and temporal, should for ever be extinguished within the Realm, and, that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority, had theretofore been, or might lawfully be exercised or used for the visitation of the Ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences,

[1] Compare p. 197, col. 1, l. 23, and p. 204, l. 49.

to ascertain the origin of the distinction between a titular and a territorial Bishop; and here I may observe, to avoid misconstruction, that in the Letters Patent and in the Judgments delivered in the Privy Council, the words "See" and "Diocese" seem to be employed as equivalent expressions, although probably the word "See" has strictly a more confined meaning than the word "Diocese." The primary reason why a Diocese, or, in other words, a limited territorial space, was originally assigned to a Bishop was not, as I apprehend, because his functions or duties were confined to that space, but because, as the superintendence of the Bishop was found to be more effectual when exercised principally over a limited extent, a territorial district termed a Diocese was assigned to him as the limits within which he should principally exercise his authority. Thus it is that England has been parcelled out into particular special Dioceses, not that each Bishop could not exercise his authority universally, but because it was justly considered to be more beneficial to the cause of religion and morality that his superintendence and labours should be principally confined to a separate district, and that he should not actively interfere with those members of the Church who were not within its limits. The Bishops of the English Church have equal and universal powers in this respect, but the ordination of Deacons and Priests, the consecration and dedication of churches, and the confirmation of young persons is (unless in exceptional cases) confined to the Bishop of the Diocese within which the exercise of the Episcopal function is locally required.

Thus it is that titular Bishops have become territorial Bishops, not because there was or is really, when unconnected with the State, any distinction between the two, but because it was found conducive to the good of the

contempts and enormities, should for ever be united and annexed to the Imperial Crown of this Realm. And by the 18th section the Queen was empowered by Letters Patent to appoint persons to exercise, occupy, use, and execute all manner of Spiritual or Ecclesiastical jurisdiction within the realms of England and Ireland, or any other the dominions and countries of the Crown.

Under this Statute the High Commission Court was erected, which was abolished by the 16th Car. I. c. 10.

By the Act of the 16 Car. I. c. 11, the 18th section of the 1 Eliz. c. 1, was wholly repealed, and by the 4th section of the same Statute all Spiritual and Ecclesiastical persons or Judges were forbidden under severe penalties to exercise any jurisdiction or coercive legal authority, an enactment which closed all the regular Established Ecclesiastical Tribunals; but by the 13th Car. II. c. 12, the ordinary Ecclesiastical jurisdiction and authority, as it existed before the year 1639, was with certain savings restored to the Archbishops and Bishops; and the Act of the 16th Car. I., excepting what concerned the High Commission Court or the erection of any such like Court by Commission, was repealed, but with a proviso that nothing should extend or be construed to revive or give force to the enactments contained in the 18th section of the 1 Eliz. c. 1, which should remain and stand repealed.

There is, therefore, no power in the Crown to create any new or additional Ecclesiastical tribunal or jurisdiction, and the clauses which purport to do so, contained in the Letters Patent to the appellant and respondent, are simply void in law. No Metropolitan or Bishop in any colony having legislative institutions can, by virtue of the Crown's Letters Patent alone (unless granted under an Act of Parliament, or confirmed by a Colonial Catholic Church (using that word as I do throughout in its proper comprehensive classical meaning), that the duties of the Bishop be limited practically to such a space as he could usefully superintend.

In addition to the power of Orders above mentioned, the Letters Patent purported to confer on the Bishop of Natal and his successors the Episcopal power *Jurisdictionis*—that is, the power and authority over all Rectors, Curates, Ministers, Chaplains, Priests and Deacons within the Diocese of Natal; and the Letters Patent direct that if any person should conceive himself aggrieved by any judgment, decree, or sentence pronounced by the Bishop of Natal or his successors, he shall have an appeal to the Bishop of Capetown, who should finally decide and determine the appeal. Beyond this, in the Letters Patent constituting the See of Capetown, a like right of appeal is professed to be given from the decision of the Bishop of Capetown to the Archbishop of Canterbury, who is finally to decide and determine the appeal. It is on this passage in the Letters Patent that the question has arisen. The Judicial Committee of the Privy Council have determined in the two cases—viz. "Long *v.* Bishop of Capetown," and "In the matter of the Bishop of Natal," that "Although in a Crown colony properly so called, or in cases where the Letters Patent are made in pursuance of an Act of Parliament, a Bishopric may be constituted and Ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet that the Letters Patent of the Crown will not[1] have any such effect or operation in a colony or settlement which is possessed of an independent Legislature."

[1] Compare p. 198, col. 2, l. 4.

Statute), exercise any coercive jurisdiction, or hold any Court or Tribunal for that purpose.

Pastoral or spiritual authority may be incidental to the office of Bishop, but all jurisdiction in the Church, where it can be lawfully conferred, must proceed from the Crown, and be exercised as the law directs, and suspension or privation of office[1] is matter of coercive legal jurisdiction, and not of mere spiritual authority.

Third. If, then, the Bishop of Capetown had no jurisdiction by law, did he obtain any by contract or submission on the part of the Bishop of Natal?

There is nothing on which such an argument can be attempted to be put, unless it be the oath of canonical obedience, taken by the Bishop of Natal to Dr. Gray as Metropolitan.

The argument must be, that both parties being aware that the Bishop of Capetown had no jurisdiction or legal authority, as Metropolitan, the appellant agreed to give it to him by voluntary submission.

But even if the parties intended to enter into any such agreement (of which, however, we find no trace[2]), it was not legally competent to the Bishop of Natal to give, or to the Bishop of Capetown to accept or exercise, any such jurisdiction.

There remains one point to be considered. It was contended before us that if the Bishop of Capetown had no jurisdiction, his judgment was a nullity, and that no appeal could lie from a nullity to Her Majesty in Council.

But that is by no means the consequence of holding that the respondent had no jurisdiction. The Bishop of Capetown, acting under the authority which the Queen's Letters Patent purported to give, asserts that he has held a Court of justice, and that with

[1] Compare p. 212, l. 3.

[2] Compare p. 187, col. 1, l. 39.

In 1845 an independent Legislature was created in the colony of Capetown, and accordingly the authority professed to be exercised by the Bishop of Capetown over Mr. Long, and also over the Bishop of Natal, was declared to be of no avail, and the sentences of deprivation were declared to be merely null and void. In 1847 an independent Legislature was created in the colony of Natal, and consequently, by the decision of the Judicial Committee, no coercive jurisdiction, such as that professed to be given by the Letters Patent to the Bishop of Natal, can, it is said, legally be exercised by him. Assuming this to be so, the question I have therefore to consider is, how far this declaration of the law affects the *status* and position of the plaintiff as a Bishop of Natal. I use the word Natal purposely, because it is obvious that it does not in the slightest degree affect his *status* and position as Bishop of the Church of England generally, not being the Bishop of any territorial see or diocese—it does not, therefore, in the least degree affect the first class of his powers—namely, that of Orders; he can as lawfully and as conclusively ordain, confirm, and consecrate, as if the coercive jurisdiction could have been exercised by him. But then I come to inquire what are the other functions conferred upon him by the Letters Patent which he cannot exercise? The words of the Letters Patent on this subject are as follows:—

"And we do further, by these presents, expressly declare that the said Bishop of Natal, and also his successors, having been respectively, by us, our heirs and successors, named and appointed, and by the said Archbishop of Canterbury canonically ordained and consecrated according to the form of the United Church of England and Ireland, may perform all the functions peculiar and appropriate to the office of Bishop within the said Diocese of Natal. And for a declaration of the spiritual causes and matters in which the aforesaid jurisdiction may be more specially exer-

certain legal forms he has pronounced a judicial sentence, and that by such sentence he has deposed the Bishop of Natal from his office of Bishop, and deprived him of his See. He also asserts that the sentence having been published in the Diocese of Natal, the clergy and inhabitants of that Diocese are thereby deprived of all Episcopal superintendence. Whether these proceedings have the effect which is attributed to them by the Bishop of Capetown, is a question of the greatest importance, and one which we feel bound to decide. We have already shown that there was no power[1] to confer any jurisdiction on the respondent as Metropolitan. The attempt to give appellate jurisdiction to the Archbishop of Canterbury is equally invalid.

This important question can be decided[2] only by the Sovereign as *head of the Established Church* and depositary of the ultimate appellate jurisdiction.

Before the Reformation, in a dispute of this nature, between two independent prelates, an appeal would have lain to the Pope; but all appellate authority of the Pope over members of the Established Church is by Statute vested in the Crown.

It is the settled prerogative of the Crown to receive appeals in all Colonial causes, and by the 25th Hen. VIII. c. 19 (by which the mode of the appeal to the Crown in Ecclesiastical causes is directed), it is by the 4th section enacted, that "for lack of justice at or in any of the Courts of the Archbishops of this Realm, or in any of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery," an enactment which gave rise to the Commission of Delegates, for which this tribunal is now substituted.

[1] Compare p. 198, col. 2, l. 11.

[2] Compare p. 194, col. 1, l. 6.

cised, we do, by these presents, further declare that the aforesaid Bishop of Natal and his successors may exercise and enjoy full power and authority, by himself or themselves, or by the Archdeacon or Archdeacons, or the Vicar-General or other officer or officers hereinafter mentioned, to give institution to benefices, to grant licences to officiate to all Rectors, Curates, Ministers, and Chaplains of all the churches or chapels, or other places within the said Diocese wherein divine service shall be celebrated according to the rites and Liturgy of the Church of England, and to visit all Rectors, Curates, Ministers, and Chaplains, and all Priests and Deacons in Holy Orders of the United Church of England and Ireland resident within the said Diocese, and also to call before him or them, or before the Archdeacon or Archdeacons, or the Vicar-General or other officer or officers hereinafter mentioned, at such competent days, hours, and places, when and so often as to him or them shall seem meet and convenient, the aforesaid Rectors, Curates, Ministers, Chaplains, Priests and Deacons, or any of them, and to inquire as well concerning their morals as their behaviour in their said offices and stations respectively, subject nevertheless to such rights of review and appeal as are hereinafter given and reserved. And for the better accomplishment of the purposes aforesaid, we do hereby grant and declare that the said Bishop of Natal and his successors may found and constitute one or more dignities in his cathedral church, and also one or more Archdeaconries within the said Diocese, and may collate fit and proper persons to be dignitaries of the said cathedral church, and one or more fit and proper persons to be Archdeacons of the said Archdeaconries respectively. Provided always that such dignitaries and Archdeacons shall exercise such jurisdiction only as shall be committed to them by the said Bishop or his successors; and the said Bishop and his successors may also from time to time nominate and appoint fit and proper persons to be respectively the officers hereinafter mentioned, that is to say, to be Vicar-General, Official Principal, Chancellor, or Rural Deans, and Commissaries, either general or special, and may also appoint one or more fit and proper persons to be Registrars and Actuaries. Provided always that the dignitaries and Archdeacons aforesaid shall be subject and subordinate to the said Bishop of Natal and his successors, and shall be assisting to him and them in the

Unless a controversy such as that which is presented by this appeal and petition falls to be determined by the ultimate jurisdiction of the Crown, it is plain that there would be a denial of justice, and no remedy for great public inconvenience and mischief. It is right to add, although unnecessary, that by the Act 3rd & 4th Will. IV. c. 41, which constituted this tribunal, Her Majesty has power to refer to the Judical Committee for hearing or consideration any such other matters whatsoever as Her Majesty shall think fit, and this Committee is thereupon to hear or consider the same, and to advise Her Majesty thereon; and that on the 10th of June, 1864, it was ordered by Her Majesty in Council that the petition and supplemental petition of the appellant should be, and the same were, thereby referred to this Committee, to hear the same and report their opinion thereupon to Her Majesty.

Their Lordships, therefore, will humbly report to Her Majesty their judgment and opinion that the proceedings taken by the Bishop of Capetown, and the judgment or sentence pronounced by him against the Bishop of Natal, are null and void in law.

exercise of his and their Episcopal jurisdiction and functions."

I have failed to discover any of the functions or powers[1] so enumerated which the Bishop of Natal is unable to exercise. No judgment of the Privy Council has deprived him of one of them.[2] The law as declared by the Privy Council's Judicial Committee leaves all these functions to the Bishop exactly as by the law of the Church of England they belong to that office. He may as Bishop visit; he may as Bishop call before him the ministers within his diocese[2]; and he may inquire respecting their morals and behaviour, and the doctrines that they preach; but the power which the Letters Patent seem to intimate an intention of conferring upon the Bishop—namely, the power of enforcing obedience to his orders in the performance of these duties, and the power of removing any obstruction which may be interposed to prevent his performing any of the functions of a Bishop—this power is not given to him personally, or to any officers of his or dependent on him. Is he therefore left powerless, and can any one with impugnity resist his authority? This is not so; but to enforce obedience to his orders, or to remove obstructions interposed to prevent his performing his functions, he must have recourse to the Civil tribunals which administer the law of the colony, before which tribunals the person who resists the acts of the Bishop may contest the validity or legality of the acts intended to be done by the Bishop or of the orders given him.

In other words, the Bishop of Natal can exercise all the duties and functions and perform all the acts which belong to a Bishop within the diocese of Natal, that he could if he were the Bishop of an English diocese, with this exception, that he cannot enforce the execution of these orders without having recourse to the Civil tribunals for that purpose. The Letters Patent, therefore, are inoperative in that respect; they are also inoperative in this further matter, that they purport to give an appeal to the Bishop of Capetown, and they also purport to give an appeal from the Bishop of

[1] Compare p. 198, col. 2, l. 43.

[2] Compare p. 193, col. 1, l. 47.

Capetown to the Archbishop of Canterbury, to whom no such appeals by law can lie, so as to enable the Bishop of Capetown or the Archbishop of Canterbury to enforce the coercive jurisdiction in these matters which the Bishop of Natal was unable to exercise. It is not that there is no appeal in such matters, but the appeal, such as it is, the extent of which I shall presently point out, lies to the Civil tribunal, and from the Civil tribunal in the colony to the Sovereign herself in Council, who, with the assistance of her Councillors, will determine the question between the parties. The more I have considered this question, which I have done very carefully, the more I have found myself at a loss to understand why, the duties and functions of the Bishop remaining in every respect the same, the fact that in order to enforce obedience to his orders and to remove obstructions interposed to impede his action, he must have recourse to the secular arm instead of enforcing it by his own power—that is, by officers of his own court—in any degree affects his *status* or position as a Bishop. He is a titular Bishop all the world over, he is a territorial Bishop within his See or Diocese of Natal, and with the assistance of the secular tribunals he can perform all the acts and duties which belong to the office of a Bishop according to the doctrine of the Church of England. It is clear that this was all that was included in the word Bishop from the earliest institution of that office down to the time when, the Christian religion having become the religion of the State, coercive jurisdiction was conferred on the prelates of the Christian Church.

It is, in my opinion, impossible correctly to assert that this necessity of resorting to the Civil tribunal, instead of enforcing obedience by the jurisdiction of the Church itself, can annihilate a see or make it cease to be a legal diocese. On the contrary, I believe that when a careful inquiry is made into what the difference is that lies between them, it will be found that the law, as pronounced by the Judicial Committee, is likely to afford greater stability and unity to the Church of England in her colonial dependencies than if the law had been as contended for by the Bishop of Capetown. In the one case, if the Letters Patent effected all that they were originally supposed to effect, the law on the subject would be declared by one prelate of the Church of England with an appeal to another prelate, and possibly finally to the Primate of All England, where the matter would end. In the other case, the law would be declared by a Civil tribunal with an appeal to the Sovereign in Council, where also the matter would end. The law, it is important to observe, is and must be the same in both cases, and ought to be similarly administered, and that law is the law of the doctrines and ordinances of the Church of England. The former are fixed and immutable, the latter are equally fixed until altered by statute. This law, whether it be enforced by the Ecclesiastical or by the Civil tribunal, is the same, and should receive the same construction, and when ambiguous the same interpretation; but if it be administered by different tribunals, a variation and discordance will arise which would be much to be deplored.

In order satisfactorily to explain my meaning in this matter, it is necessary to point out what I consider to be the real position of the Church of England in these colonies. It is declared in the Judgment of the Judicial Committee that the Church of England in the colonies which have an established Legislature and no Church established by law is to be regarded in the light of a voluntary association, "in the same situation with any other religious body,

in no better but in no worse position, and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them." These expressions have created some alarm, which has, as it appears to me, arisen from an imperfect apprehension of what is meant by them. They do not mean, as some persons seem to have supposed, that because the members of such a Church constitute a voluntary association they may adopt any doctrines and ordinances they please, and still belong to the Church of England. All that really is meant by these words is, that where there is no State religion established by the Legislature in any colony, and in such a colony is found a number of persons who are members of the Church of England, and who establish a Church there with the doctrines, rites, and ordinances of the Church of England, it is a part of the Church of England, and the members of it are, by implied agreement, bound by all its laws. In other words, the association is bound by the doctrines, rites, rules, and ordinances of the Church of England, except so far as any statutes may exist which (though relating to this subject) are confined in their operation to the limits of the United Kingdom of England and Ireland. Accordingly, upon reference to the Civil tribunal in the event of any resistance to the order of the Bishop in any such colony, the Court would have to inquire, not what were the peculiar opinions of the persons associated together in the colony as members of the Church of England, but what were the doctrines and discipline of the Church of England itself, obedience to which doctrines and discipline the Court would have to enforce. This is the more important to be borne in mind, because it is the want of duly considering this that has given rise not only to much misapprehension on this subject, but also, as I conceive, to still more serious results. The rule by which the Courts are bound is this. If any number of persons, either in England or in any of its dependencies, associate themselves together, professing to follow a particular religion, not being the religion of the State, the Court must, when applied to, inquire into what the doctrines and discipline of that religion are, and must then enforce obedience to them accordingly. Thus, if they be Presbyterians, or Independents, or Wesleyans, or Baptists, or the like, the Court ascertains as a matter of fact, upon proper evidence, what the doctrines, ordinances, and rules are by which the particular sect of religionists is bound, and enforces obedience to them accordingly. It is needless to cite authorities to establish this proposition. The books abound with decisions on the subject, all of the same character, many of which have been cited and referred to in the case of "Long *v.* Bishop of Capetown" and in the present case, and are familiar to every one conversant with this subject. Thus to apply that principle to the present case in illustration of the observations I am now making, and explanatory of the passage I have read from the judgment in "Long *v.* Bishop of Capetown," if a class of persons in one of the dependencies of the English Crown having an established Legislature should found a Church, calling themselves members of the Church of England, they would be members of the Church of England, they would be bound by its doctrines, its ordinances, its rules, and its discipline, and obedience to them would be enforced by the Civil tribunals of the colony over such persons; but if a class of persons should in any colony similarly circumstanced call themselves by any other name, such as, for instance, the Church of South Africa, then the Court would have to inquire, as a matter of fact upon proper evidence, what the doctrines, ordinances, and discipline of that Church were; and when these

were made plain, obedience to them would be enforced against all the members of that Church. But the fact of calling themselves in communion with the Church of England would not make such a Church a part of that Church of England, nor would it make the members of that Church members of the Church of England. If they adopted its creed and doctrines, but repudiated a part of its rules and ordinances, they would be bound by those which they had adopted, and not by those which belonged to the Church of England, but which they had rejected. It would, however, be incumbent upon them fully and plainly to set forth what their rules and ordinances were, and who accepted them, in order that this might prevent doubt when the Courts of Law were called upon to enforce obedience to these rules and ordinances. The whole of what I am now stating is made very distinct and clear by the whole of the decision of the Judicial Committee of the Privy Council in the case of "Long *v.* Bishop of Capetown." In that case the Judicial Committee held that Mr. Long had bound himself to the doctrines and discipline of the Church of England, and if the obedience required of him by the Bishop of Capetown had been obedience to the rules and ordinances required by the Church of England, that obedience would have been enforced by the Judicial Committee. Accordingly they inquired into that subject, and, having done so, held that the obedience required by the Bishop of Capetown was not in accordance with the rules and ordinances of the Church of England, and that Mr. Long was justified in resisting the summons of the Bishop. This was, in fact, the real issue between the Bishop of Capetown and Mr. Long, and the point is put distinctly and, as I apprehend, quite correctly by Mr. Long, who says in his letters of the 29th of November and 3rd of December, 1860, that a declaration by persons that "they are members of the Church of the Diocese of Capetown, in union and in full communion with the United Church of England and Ireland, and belonging to no other body, is, in his opinion, a declaration of virtual secession from the Church of England." And in another place Mr. Long states that he is a member of the Church of England, and not a member of a Church in union and in full communion with the Church of England, which are, in his opinion, two separate and distinct things. The distinction is plain and obvious. Any Church established by voluntary association may call itself in union and in full communion with any other Church. A Lutheran Church established in South Africa might call itself in union and full communion with the Church of England, but the truth of the assertion is a distinct matter. But if certain persons constitute themselves a voluntary association in any colony as members of the Church of England, then, as I apprehend, they are strictly brethren and members of that Church, though severed by a great distance from their native country and their parent Church. They are bound by the same doctrines, the same rules, ordinances, and discipline. If any recourse should needs be had to the Civil tribunals, the questions at issue must be tried by the same rules of law which would prevail if the question were tried in England;—with this exception only, that the tribunal would probably be different, and that as the statutes which constitute certain Ecclesiastical tribunals in England do not extend to the colonies, the question would have to be determined by the ordinary Civil courts which administer justice in the colonies.

It is on this principle which I have endeavoured to enunciate that the Judicial Committee of the Privy Council investigated and determined the

case of "Long *v.* Bishop of Capetown." In the carefully considered Judgment delivered on that occasion, no suggestion is made that the Church established at Capetown, over which Dr. Gray presided as Bishop, is not a part of the Church of England, nor does any doubt seem to have been entertained by the Court on that point. On the contrary, the whole Judgment proceeds on the assumption, and is based on the foundation, that the Church so established is a portion of the Church of England. That Judgment states that the Church of England, in places where there is no Church established by law, is in the same situation with any other religious body, thereby affirming that the Church of England may extend to and have branches in places where it is not established by law. The Judgment proceeds to state that, where in such places tribunals are constituted by the members of the Church for the purpose of determining whether the members of that Church there residing have violated any of its rules in order to enforce the decisions of any such tribunals, recourse must be had to the Courts established by law, and such Courts will give effect to their decisions when the tribunal which pronounced it has acted "within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice." The Judgment then proceeds thus:—

"We think that the acts of Mr. Long must be construed with reference to the position in which he stood as a clergyman of the Church of England, towards a lawfully appointed Bishop of that Church, and to the authority known to belong to that office in England; and we are of opinion that, by taking the oath of canonical obedience to his Lordship, and accepting from him a licence to officiate, and have the cure of souls within the parish of Mowbray, subject to revocation for just cause, and by accepting the appointment to the living of Mowbray under a deed which expressly contemplated as one means of avoidance the removal of the incumbent for any lawful cause,—Mr. Long did voluntarily submit himself to the authority of the Bishop to such an extent as to enable the Bishop to deprive him of his benefice for any lawful cause—that is, for such cause as (having regard to any differences which may arise from the circumstances of the colony) would authorize the deprivation of a clergyman by his Bishop in England. We adopt the language of Mr. Justice Watermeyer, p. 81, that 'for the purpose of the contract between the plaintiff and defendant, we are to take them as having contracted that the laws of the Church of England shall, though only as far as applicable here, govern both.'"

Having done this, their Lordships proceed to consider whether, according to the law of the Church of England, Mr. Long had so acted as to justify his suspension and subsequent deprivation, and they determine that he had not so acted. The manner in which they characterize the assembly convened by the Bishop is as follows:—

"It was a meeting of certain persons, both clergy and laity, either selected by the Bishop, or to be elected by such persons and in such manner as he had prescribed, and it was a meeting convened, not for the purpose of taking counsel and advising together what might be best for the general good of the society, but for the purpose of agreeing upon certain rules, and establishing in fact certain laws, by which all members of the Church of England in the colony, whether they assented to them or not, should be bound."

"Accordingly, the Synod, which actually did meet, passed various Acts and constitutions purporting, without the consent either of the Crown or of the Colonial Legislature, to bind persons not in any manner subject to its control, and to establish Courts of Justice for some temporal as well as spiritual matters, and, in fact, the Synod assumed powers which only the Legislature could possess. There can be no doubt that such acts were illegal."

In what sense illegal? Not certainly illegal if all the members of that Church had previously agreed to be bound by such an assembly, but illegal

because not justified by the discipline and ordinances of the Church of England, by which alone Mr. Long had agreed to be bound. This decision, therefore, is far from deciding that the Bishop in these colonies has, by virtue of his appointment by the Letters Patent, no jurisdiction and no tribunal; what it does decide is that the tribunal of the Bishop is a *forum domesticum*, and not a State tribunal. That it is not a Court of the colony of the Cape of Good Hope exercising authority by reason of the Church of England being the religion of the State of the colony of the Cape of Good Hope, but that it is a domestic tribunal of the Bishop, the essence of which is that the jurisdiction is only over those persons who assent to it, and the jurisdiction is what is usually called "consensual" jurisdiction. All the persons professing to be members of the Church of England are, by this decision, held to have assented to the jurisdiction of this *forum* so far as the Bishop does not overstep his authority—that is, the authority of a Bishop of the Church of England to the full extent that such authority is not derived from that religion being the religion of the State, or from statutes which have operation solely within the United Kingdom. It was because the Bishop had exceeded that authority, and because the Lords of the Privy Council could not find any thing in the evidence to show that Mr. Long had assented to any thing more than this—that they declared the sentence of the Bishop of Capetown to be null and void.

It is neither necessary nor desirable that I should attempt to define the limits of the authority which a Bishop of the Church of England could exercise in such his *forum domesticum*, or distinguish it from those further and additional powers which can be exercised within the United Kingdom, which are derived from the Church of England being therein the religion of the State, and from those which are also derived from the provisions of statutes which have force only within that kingdom. One distinction, however, is obvious and important. A Bishop in England is the Bishop over all the inhabitants within the diocese; a Bishop in the colony is Bishop only over all the members of the Church of England resident within the colony. Whenever the question arises, as it did in "Long *v.* Bishop of Capetown,"—viz. whether the act done by the Bishop lies within such limited scope of his authority, that question must then be decided; and accordingly that question was in fact decided in that case. No such question as that is now before me; all that I have to do on the present occasion is to explain how that judgment, together with the judgment in the matter of the Bishop of Natal, bears on the question before me, which is whether the province of Natal has been made a Diocese, and whether the plaintiff is Bishop of that Diocese, and as such entitled to the benefit of the endowment made for such a Diocese. On this subject an expression has been made use of in the Judgment given in the latter case before the Privy Council, which is, I think, liable to be misunderstood, and which it is essential to notice. It is there stated (p. 148) to this effect:—The Lord Chancellor who delivered the Judgment having observed that, after a colony has received legislative institutions, the Crown stands in the same relation to that colony as it does to the United Kingdom, proceeds thus—"It may be true that the Crown, as legal head of the Church, has a right to command the consecration of a Bishop, but it has no power to assign him any diocese or give him any sphere of action within the United Kingdom." This sentence taken literally, that is, if the words United Kingdom refer to the word diocese, is strictly correct; but if, as some have supposed,

and such I consider to have been the meaning of the Court from the previous passage, it is construed to mean that the Crown can create no see or diocese in any such a colony as that of Natal or Capetown, this, I apprehend, is not the meaning of the passage, and if it were it would be erroneous. To be properly understood, the passage must be taken in conjunction with the whole context. It is not thereby intended to state that the Crown is unable to appoint a person a Bishop and direct him to exercise his functions in a colony dependent on the Crown to the extent specified in the Judgment of "Long *v.* Bishop of Capetown" within certain defined limits where these functions do not interfere with any other see or diocese lawfully created. Nor is it intended to state that the territory, the limits of which are so defined, would not constitute a see or diocese properly so called; but it is thereby intended to state that the Crown has no power to constitute a see or diocese analogous to a see or diocese within the limits of the United Kingdom of England and Ireland, investing the Bishop with coercive jurisdiction. For instance, that the Crown could no more have created the see of Natal, and appointed to it a Bishop with all the coercive powers of an English Bishop over all the inhabitants in that colony, than the Crown could have created the Diocese of Ripon or the Diocese of Manchester and have appointed Bishops to preside over such dioceses without the authority of an Act of Parliament. That this is the limited meaning of the passage is plain from the whole Judgment. Were it to receive a wider construction it would not be in accordance with the Judgment in "Long *v.* Bishop of Capetown," which it adopts and professedly follows. The decision "in the matter of the Bishop of Natal" did not decide that the Bishop of Capetown had not, as Bishop of the See or Diocese, any *forum* or tribunal within which he could lawfully exercise his authority as Bishop of that Diocese, but that it was a *forum domesticum*, which did not warrant the proceedings he instituted against the Bishop of Natal, and that there was nothing in his acts to give the consensual jurisdiction essential to any such *forum*, and further that, consistently with his duty as Bishop of Natal—that is, as a Bishop of the Church of England—he could not give any such consensual jurisdiction. In fact, it is not the coercive jurisdiction which constitutes the see or the diocese. The early Bishops of the Christian Church had a see or diocese as completely before as they had after the Christian Church had become the religion of the State, although the former could only exercise jurisdiction over the members of the Church of Christ who submitted to their jurisdiction, while the latter possessed coercive power derived from the Christian religion having become the Church of the State. When this ambiguity is removed, the two Judgments are identical. The importance of them, and more especially of that of "Long *v.* Bishop of Capetown," which expounds the principle of the law, and particularly the importance of the passages to which I have referred in relation to the *status* of the plaintiff in the district of Natal, is this:—It shows that the district or colony of Natal is a district presided over by a Bishop of the Church of England which is properly termed a See or Diocese—that the Ministers, Deacons and Priests, officiating within that district, and also all the laymen professing to be members of the Church of England, constitute not a Church in Natal in union and in full communion with the Church of England, but a part of the Church of England itself;[1] and that all the Ministers, Priests and Deacons, there officiating, and all the

[1] Compare p. 194, col. 1, l. 18.

persons composing the several flocks, are members and brethren of the Church of England in the strict sense of the term. The consequence is that they have in all matters Ecclesiastical voluntarily submitted themselves to the control of the Bishop of Natal so long as it is exercised within the scope of his authority according to the principles prescribed by the Church of England.

If, however, any sentence of the Bishop of Natal should be contested, recourse must be had to the Courts established by law, which will enforce that sentence if pronounced within the scope of the legal authority of the Bishop, and if he has, in arriving at that sentence, proceeded in a manner consonant with the principles of justice, in so doing the Court established by law will proceed upon the laws of the Church of England, so far as they are applicable in Natal. In this respect the decision in "Long *v.* Bishop of Capetown" and "in the matter of the Bishop of Natal" are identical. And so far from arriving at the conclusion which was pressed upon me in argument in various forms, and which may be stated thus—that these decisions have established, or rather pointed out, that no legal identity exists between the Church presided over by the Bishops in colonies with established Legislatures and the United Church of England and Ireland—I have arrived at the exactly opposite conclusion—that is, I have come to the conclusion that but for these decisions such identity, though now existing, would very speedily cease to exist. So long as the law on this subject must in the final resort be administered by Civil tribunals according to the laws of the Church of England to the extent that such laws are applicable in such colonies, and this with a right of appeal to the Sovereign in Council, it is reasonably certain that the law will be uniformly administered amongst all the dependencies of the Crown which possess an established Legislature, and have not any religion established by law. But if each Church is to consider itself a separate and independent Church, though in union and full communion with the Church of England, and if each Church claim to possess full power to make rules and ordinances for its guidance in each separate colony, and to constitute an Ecclesiastical tribunal under the Bishop, and entrust him with full power to enforce such rules and ordinances without any appeal to any tribunal except to the *forum domesticum* of the Archbishop of Canterbury for the time being, it requires but little foresight to predict that, in the course of a very short time, humanly considered, the Colonial Churches, though calling themselves in union and in full communion with the Church of England, would in forms and ordinances, and in matters of Church government, differ widely from each other and from their parent Church. Nor is it too much to say that some alteration of doctrine would probably in many cases follow upon the alteration in the discipline and government of the Church. Another consequence may also, I think, be reasonably predicted to arise from such a state of things, by any one who has carefully observed the disposition of the English people in such matters. If he has done so, he cannot fail to have noticed how deep-rooted an attachment to the Church of England exists in the people generally, even amongst those portions which are not sedulous in attendance at places of public worship; and this consequence is that, as soon as this matter shall have become clearly understood by the English resident in the colony, there would be a rapid and large secession from the Church which was only in union and in full communion with the Church of England, to the Church of England itself, which

even in those distant colonies would receive and foster her brethren as part and parcel of her own peculiar flock.

The effect, therefore, of these decisions is, as it appears to me, that, though they have established that the Letters Patent cannot create new Ecclesiastical tribunals, or introduce into the colonies any of the Ecclesiastical tribunals which subsist in this country, they have also established that every exercise of Ecclesiastical authority and every act of any member of the Church in such colony professing to be a part of the Church of England must in matters spiritual be governed by the laws of the Church of England, and must be tried by the application of those laws. This is strongly illustrated by Dr. Warren's case, which is sometimes misunderstood; the Court refused to examine into the propriety of the decision of the Conference in that case, for this reason—what they did was to ascertain that by the rules and ordinances of the Wesleyan body every minister agreed to be bound by the decision of the Conference, and having ascertained this, the Court inquired no further. In "Long *v.* Bishop of Capetown," the Court also inquired whether, according to the rules and ordinances of the Church of England, Mr. Long had agreed to attend and be bound by the assembly summoned by the Bishop of Capetown, and the Court held that he had not. It is the more important that the real *status* and condition of the Colonial Churches should be constantly present to the mind, because, as it appears to me, erroneous notions prevail to a great extent on this subject. Some persons seem to imagine that they were founded and endowed in order that the association in each colony should form a separate and independent Church. So far has this been carried that it seems to be supposed that, if the members of such Colonial Church, or a majority of them, should so think fit, they might, if dissatisfied with the person whom the Crown had appointed to be their Bishop, withdraw from his superintendence and elect a Bishop for themselves. That any number of persons, if they so pleased, might, though holding the doctrines of the Church of England, reject, either wholly or in part, the discipline and government of the Church, though they preserved still the creed, faith, and doctrines of the Church of England, is unquestionable. Such an association might elect their own Bishop, they might divide the district in which they reside into sees and elect a Bishop for each; they might parcel the district out into parishes and appoint a minister to officiate in each parish: all this they might do, and all this would be perfectly legal, and all this would be binding on the members of the association who assented to it; —as it is now in the Episcopal Church in Scotland, which is not, and by the Act of Union is prohibited from being, a part of the Church of England, and in which the Crown is prohibited from appointing or nominating any Bishop. If dissensions arose amongst the members of such a Church, they must have recourse to the Civil tribunals; but when they did so the question would be tried by their own rules and ordinances, which would have to be proved by evidence in the usual manner. But this association would not be a branch of the Church of England, although it might call itself in union and full communion with it. By the law of the Church of England the Sovereign is the *head of the Church*, and in substance (for the *congé d'élire* is nothing more than a form) no Bishop can be lawfully nominated or appointed except by the Sovereign, nor, as I apprehend, could any person be legally consecrated a Bishop of such Church unless by the command of the Sovereign. If the members of the Inns of Court were to present one of their

preachers to the Archbishop of Canterbury, saying that they had elected him Bishop of the Inns of Court, and prayed that he might be consecrated, although the most rev. prelate might feel disposed to accede to such prayer, I apprehend that he could not lawfully do so, and that upon application a prohibition would issue from the Court of Queen's Bench to prevent such a consecration. So, in like manner, the members of the Church in Natal might elect a divine and call him Bishop of Natal, or invest him with any other title; but even if the Archbishop of Canterbury could be induced to consecrate such a person in due form, he would, I apprehend, have no legal authority to exercise any of those functions which belong exclusively to a Bishop of the Church of England. What his peculiar *status* in the Catholic Church of Christ might be I do not profess to state,[1] but I apprehend that he would not be a Bishop of the Church of England, and that, when the validity of his ordinations and consecrations came to be contested in a court of law, they would not appear to have made the persons ordained Priests or Deacons of the Church of England, nor would the places consecrated by him belong to that Church.

To adopt the words of the Judgment in the case of the Bishop of Natal, the course which legislation has taken on this subject is a strong proof of the correctness of these conclusions.

In 1786, shortly after the American colonies had been severed from this country, it was thought necessary to pass an act of Parliament to enable the Archbishops of Canterbury and York to consecrate candidates for Episcopacy in countries not under the dominion of the Crown; but even this permission was not granted without the licence of the Crown for each particular case being first obtained; and the statute also provided that no person so consecrated should exercise any Episcopal functions within the United Kingdom.

In 1819 the Archbishops of Canterbury and York were empowered by the Legislature to ordain persons specially for Her Majesty's colonies. The statute provided that no person not ordained by any Bishop or Archbishop of England or Ireland should officiate in any church in England or Ireland without the special permission of the Archbishop of the province, or hold any Ecclesiastical preferment or act as Curate therein without the consent of the Archbishop of the province, and also of the Bishop of the diocese; and the statute also provided that no person ordained by a colonial Bishop who did not at the time possess Episcopal jurisdiction over some diocese, district, or place, and also reside therein, should hold any Ecclesiastical preferment within Her Majesty's dominions, or officiate in any place as a minister of the Church of England and Ireland. (59 Geo. III., c. 60.)

In 1840 the Legislature permitted the clergy of the Episcopal Church in Scotland, and in the United States of America, to officiate for one or two specified days, on a permission given in writing by the Bishop of the diocese, in a specified church within the United Kingdom, with consent of the incumbent.

In 1852 an Act (15 and 16 Vict., c. 52) was passed which enacted that nothing contained in the two last-mentioned Acts, and also in two Acts (53 Geo. III., c. 155; 3 and 4 Will. IV., c. 85) therein recited, and which are also mentioned in the Judgment of the Privy Council, and which referred to bishoprics in India, should extend to any person who upon the request and by the commission of the Bishop of any diocese in England or Ireland should

[1] Compare p. 193, col. 2, l. 32.

have been ordained a Deacon or Priest within the limits of such diocese by any Bishop who, by virtue of Her Majesty's Letters Patent, should have exercised the office of Bishop in India or in any of Her Majesty's colonies or foreign possessions; and it enacted that all admissions to benefices in the United Church of England and Ireland, and all appointments to act as Curates and Chaplains therein of persons so ordained, should be valid in law. (15 and 16 Vict., c. 52.

In the following year (16 and 17 Vict., c. 49) this was extended, and it was enacted that, notwithstanding the provision in the recited Acts to the contrary, "all persons who have been or hereafter shall be ordained by any of the said Bishops in or for the diocese of the Bishop of any other of Her Majesty's foreign or colonial possessions, upon his request in writing shall be entitled to all the same rights, privileges, and advantages as if he had been ordained by such Bishop within the limits of a diocese over which he was at the time himself actually exercising jurisdiction and residing there." It is impossible to read these Acts and not to see that the provisions therein contained apply, so far as the colonies are concerned, exclusively to the acts of Bishops who exercise the office of Bishop in such colonies by virtue of Her Majesty's Letters Patent. This is expressed in the statute of 1852 (15 and 16 Vict., c. 52), and in the Act I have last mentioned is repeated by referring to the Bishops mentioned in the previous statute. Throughout all these statutes it is pointed out by irresistible inference that no Bishop of the Church of England can be created without the authority of the Crown; and also that the authority of Parliament is required to make the ordinations and acts of Bishops in Her Majesty's foreign possessions effectual within the United Kingdom. All these statutes, therefore, appear both directly and indirectly to confirm the view I have taken of this part of the case.

To sum up the conclusions shortly, in my opinion, the case stands thus:—

The members of the Church in South Africa may create an Ecclesiastical tribunal to try Ecclesiastical matters between themselves, and may agree that the decisions of such a tribunal shall be final, whatever may be their nature or effect. Upon this being proved, the Civil tribunal would enforce such decisions against all the persons who had agreed to be members of such an association, that is, against all the persons who had agreed to be bound by these decisions, and it would do so without inquiring into the propriety of such decisions. But such an association would be distinct from, and form no part of, the Church of England, whether it did or did not call itself in union and full communion with the Church of England. It would strictly and properly be an Episcopal Church, not *of* but *in* South Africa, as it is the Episcopal Church in Scotland but not of Scotland. But if the Episcopal Church in South Africa chose to remain part of the United Church of England and Ireland, then no such irresponsible tribunals could exist, and when recourse is had to the Civil tribunal to enforce obedience to these decisions, they must be subject to revision to the extent I have already pointed out as laid down by the Judgment in the case of "Long *v.* Bishop of Capetown." In one case it is one Church in all the colonies, each association being part of the parent Church of the United Kingdom of England and Ireland; in the other case they are separate and distinct Episcopal Churches, each existing separate in each colony and distinct from every other Church, bound by their own canons only, and no more by the canons of any other Church than they would be by the canons of the Episcopal Church in Scotland, according to

their final settlement by the last Synod held in Edinburgh in 1860 for that purpose, and all of them rejecting, as the Church in Scotland is compelled to do, the Thirty-seventh of the Articles of the English Church, which puts the Sovereign at the head of the Church. I have gone so fully into this subject because the full comprehension of what is the actual position of the Church founded and endowed in these colonies by members of the Church of England is of the highest importance for the purpose both of determining what the *status* of the plaintiff is, and also of disposing of the remaining point I have to consider, which was strongly urged upon me—viz. how far the objects and intention of the persons who contributed the funds for founding the Bishopric of Natal have been fulfilled. It was argued that to continue the payment of the stipend to the plaintiff, having regard to his actual legal *status*, would be in the nature of a breach of trust. Except in the case of one contributor, I have not before me any distinct evidence of what were the objects of the persons generally who advanced the funds, further than this, that they desired to found a Bishopric in the colony of Natal.

But this one, who is the principal contributor, is a lady, who, with her constant, boundless charity, has supplied very large funds for the purpose of endowing Colonial Bishoprics, and who has addressed a letter on the subject to the Archbishop of Canterbury, which has been produced in evidence, and has been brought prominently forward in the discussion of this question. The letter itself is carefully written, and has, I assume, undergone final revision and approval from the advisers of this lady before it was published. In this letter are the following passages, which contain the substance of the argument addressed to me on this subject:—

"I had always supposed that in undertaking to provide funds for the endowment of colonial sees I was co-operating with the Archbishops and Bishops of the United Church of England and Ireland in laying the foundation of efficient Church government for the members of our National Church resident in the respective colonies, and that the Crown, by its Letters Patent, had power to give legal effect to an order of things calculated to secure that the doctrine and discipline of the Church of England, by law established, should be maintained in their completeness amongst the congregations of our own communion in those colonies. Without this security I should not have guaranteed the endowment funds, and upon the faith of this having been accomplished by the issuing of Her Majesty's Letters Patent, I fulfilled in each case my guarantee.

"The declaration, however, of the state of the law which is to be found in the Report of the Judicial Committee of Her Majesty's Privy Council upon the case of the Bishops of Capetown and Natal, has drawn my attention more particularly to the fact that the conditions upon which I undertook to make provision for the endowment of a Bishop's see at Capetown have not been fulfilled by Her Majesty's Letters Patent, and I find, with most painful surprise, that the Bishop nominated to the see of Capetown is declared in that report not to have any effective Ecclesiastical jurisdiction, and my anxiety is increased by the advice which I have received from eminent counsel, that the Letters Patent of the Crown purporting to erect the sees of Adelaide and British Columbia and Vancouver's Island with jurisdiction over the clergy in those colonies may prove to be equally ineffectual with the Letters Patent of Capetown."

It will be seen, by the observations I have already made, that in my opinion this letter is written in misapprehension of the real effect of the decisions of the Judicial Committee in the two cases referred to. The writer observes that she would not have guaranteed the funds unless upon the faith that the Crown, by its Letters Patent, had power to give legal effect to an order of things calculated to secure that the doctrine and discipline of the Church of England, by law established, should be maintained in their

completeness amongst the congregations of our own communion in these colonies. If I am right in the observations I have made upon the effect of the decisions of the Privy Council, this object will be far better accomplished by securing an uniform administration of the same law throughout all the colonies, instead of founding separate and independent Churches, each framing its own rules of discipline. Afterwards the writer finds, with the most painful surprise, that the Bishop nominated to the See of Capetown is declared not to have any effective Ecclesiastical jurisdiction. This, again, appears to me to spring from a misapprehension. It is not declared by the judgment of the Privy Council that the Bishop of Capetown has no effective Ecclesiastical jurisdiction, unless in the word "effective" is included the word "irresponsible." The Judgment of the Privy Council has declared in the case of Mr. Long that the Bishop of Capetown has an effective Ecclesiastical jurisdiction, provided it be administered in accordance with the doctrine and discipline of the Church of England, and in a manner consonant with the principles of justice. That if it be so administered it will be enforced and carried into execution by the power of the Civil tribunals, but that if it be not so administered it is a nullity: and that whether it be or be not so administered is a question to be determined by the Civil tribunals of the colony, with an ultimate appeal to the Sovereign in Council. If, indeed, the persons who contributed these funds did so on the faith that the decision of the Bishop in the colony, or of the Archbishop of Canterbury, on an appeal to him in his domestic tribunal should be final; and, further, that that decision should not be questioned in any court of justice, not even in the Court of Arches, the Ecclesiastical Court of the Archbishop, but which is presided over by a layman, and from whose decisions an appeal lies to the Queen in Council,—then unquestionably this object is not accomplished by the Letters Patent; but there is not any thing that I can find in the previous correspondence, or in these Letters Patent*, which purports to effect this, or which ought to have induced the subscribers to expect that such a result would be obtained. And it is further to be observed, that such a result would have involved a principle which would have been wholly repugnant to the foundation on which the discipline of the Church of England rests, which makes the Sovereign the Supreme *Head of the Church* in all her dominions, a principle which is expounded and enforced in the Thirty-seventh of the Articles of Religion of the English Church. I cannot, therefore, from this letter, or from any other document before me, come to the conclusion that the object of the persons who contributed to form a fund to endow Bishoprics in the colonies dependent upon England was to elevate the Church over the Throne, or to depose the Sovereign from being the *head of the Church of England* in the colonies dependent on her.

But even if this were the case, and that the object of the persons who contributed the funds for endowing the Bishopric of Natal has failed, this would not dispose of the question.

This was a contract entered into by three parties to it—the Crown, the trustees of the fund, on behalf of the contributors, and the plaintiff, and although it is true that this Court will occasionally refuse specifically to enforce a contract where one of the parties who entered into it did so by mistake and while ignorant of the real state of the case, yet, where the contract has not only been entered into, but has also been acted upon, and where

* Compare p. 185, col. 1. *passim*.

it is impossible to restore all the parties to it to the same position which they were in before the contract was made, the Court of Chancery never annuls the contract. Who now can restore the plaintiff to his former position in 1853? Assume that the contributors can truly say, "We subscribed this fund to make the plaintiff a Bishop, with coercive powers, inherent in his own Episcopal jurisdiction. We find that the plaintiff, as Bishop, must have recourse to a court of law for that purpose, and therefore we annul the engagement,"—could any Court listen to such arguments, or could such a doctrine be admitted to annul the contract? All persons are bound to know the law. Ignorance of the law, according to the hackneyed but most necessary maxim in our jurisprudence, and indeed in every jurisprudence, excuses no one. The contributors, therefore, must be treated as knowing, or as being bound to know, that to enforce the decision of the Bishop he must have recourse to a court of Civil jurisdiction, and that the Court so resorted to would sit in judgment upon and review the correctness of the decision to this extent—that the Court would ascertain whether the Bishop had acted within the scope of his authority, and had proceeded in a manner consonant with the principles of justice, and the plaintiff might justly say to the contributors, "You cannot now recede from your engagement, because that is made manifest to you which from the first you must or ought to have been well acquainted with."

These last observations would unquestionably not apply to the next person who was appointed Bishop of Natal, if a vacancy should occur. With the successor a fresh contract would have to be made, the terms of which, expressed or implied, would bind the parties to it, but that has nothing to do with the plaintiff.

I am therefore of opinion that the views and objects of the persons who contributed the fund, whatever effect it may have with respect to any future appointment, cannot be called in aid for the purpose of depriving the plaintiff of his salary as Bishop of Natal. I must also say that the more I consider this part of the case, the more strongly I am impressed with the belief that the real state of the case, and the real effect of the decisions of the Privy Council, have not been present to the minds of the persons who, having subscribed the funds for the endowment of the Bishopric, now object to the application of them for payment of the income of the plaintiff.

The practical effect of the decision is simply this, that an appeal to the extent I have stated lies from the decisions of the Bishop in the colonies to the Courts of Law in those colonies, and from thence to the Privy Council. Is it really believed by any large number of the contributors to these funds, that this is an order of things ill calculated to secure "that the doctrine and discipline of the Church of England by law established should be maintained in their completeness amongst the congregations of our own communion in these colonies?" Can it be fairly said, that "the Bishop nominated to the See of Capetown is declared to have no effective Ecclesiastical jurisdiction," because his decisions are liable to be revised by a court of law to this extent—that wherever he exceeds the scope of his authority as established by the rules and discipline of the Church of England, and wherever he does not proceed in a manner consonant with the principles of justice, his decisions are void and of null effect? The Bishop of Capetown, the Bishop of Natal, the Bishops of all colonies similarly circumstanced—i. e. having an established Legislature, but having no Established Church, can, as regards the

ministers and congregations of the Church of England, within their diocese, exercise all the powers of a Bishop; they can ordain, confirm, and consecrate; they can do more—they can visit, investigate, reprove, suspend, and deprive;* and if, in so doing, they keep within the due scope of their authority as established by the discipline of the Church of England as by law established, and proceed in the exercise of that authority in a manner consonant with the principles of justice, their acts are valid, and will be enforced by the legal tribunals. It is only when their acts fail in these respects, when they exceed their authority as regulated by the law of the Church of England, or when they proceed in a manner not consonant with the principles of justice, that the Bishops cease to be able to enforce their decisions. Surely this is not such an evil as to make subscribers believe that they have applied funds for the purpose of constituting an order of things which in the colonies will fail to secure "maintenance of the doctrine and discipline of the Church of England by law established." I am also at a loss to understand why the prelate so appointed is less a Bishop because he does not possess coercive jurisdiction incidental to an Episcopal tribunal,† to try Ecclesiastical offences within his diocese, of which he is the head, than because he is deprived of, or rather has not had conferred upon him, the administration of the personal property of deceased persons which did formerly belong, and to some very limited extent still belongs to an English Bishop in England.

The three powers belonging to a Bishop, according to all principal authorities, are—first, the power *ordinis;* second, *jurisdictionis;* third, *administrationis rei familiaris.* The colonial Bishop possesses the first unfettered, without control or appeal; the second he possesses in this way—that he must apply to lay tribunals to enforce his decisions, which lay tribunals will review them and consider their correctness according to the law which the Bishop himself is bound to administer to the extent I have above stated; the third he does not possess at all; it was not ever proposed to be given to him; it belongs to a different officer, and to a different tribunal. The absence of this authority, or of this power, does not disturb the defendants; it does not, in their opinion, or indeed in the opinion of any one, affect his *status* as a Bishop; but because a fetter is imposed on the second of his powers, by which he is constrained, when the matter is questioned before a court of law, to show that he has exercised his jurisdiction within the scope of his authority as established by the law of the Church of England, and also that he has proceeded in a manner consonant with justice, it is supposed that he is no longer the Bishop of a diocese, and that the object which the subscribers had in view in causing his appointment is entirely frustrated.

It is, no doubt, open to all tribunals to err, and it may, and probably does, appear to many persons who have carefully considered, and who take a deep interest in this subject, that the lay tribunal is less likely to understand, and less likely fully to appreciate the bearing and importance of a religious question, though one relating solely to the extent of the Bishop's authority and his mode of exercising it, than a tribunal composed of Ecclesiastical personages would do; and this consideration unquestionably opens a very large question, which is, whether it is a beneficial condition of things that the State should be superior to the Church in matters Ecclesiastical. But the solution of this question does not lie within my province; it cannot affect

* Compare p. 196, col. 1, l. 10. † Compare above, l. 4.

my decision on the present occasion: it is sufficient for me to point out that the fundamental principle of the Church of England puts the Sovereign at the head of all causes, Ecclesiastical as well as Civil, and consigns the decision of matters Ecclesiastical, in the last resort, to the Sovereign herself, with the assistance of the members of her Privy Council.

In reviewing the whole of this case, it is impossible not to look a little at ulterior consequences, and although it is not safe, when expounding the law on any subject, to rely on the results of the decision, still it may not be improper to point out what would be some of the difficulties which would arise if I were to adopt the arguments of the defendants, and dismiss the plaintiff's bill. If no portion of the funds of which the defendants are trustees can be applied towards the payment of the salary of the Bishop of Natal, no portion of these funds can properly be applied towards the payment of the salary of any other Colonial Bishop similarly circumstanced. Are no more Bishops to be appointed in colonies having an established Legislature and having no Established Church? Are the ministers and congregations of the Church of England in such colonies to be left without the advantages which are found to flow from the superintendence and watchful care of a Bishop?

Another difficulty, and one which would seriously affect the defendant, is this—If the suit of the plaintiff were dismissed, what is to be done with the money dedicated for the endowment of a Bishop of Natal, and the accumulated income since 1864? Is it to go on accumulating? is it to be retained by the trustees for their own benefit because no *cestui que* trust exists? Can it be returned to the subscribers? and if not, is it to be applied *cy prés?* The mere statement of these propositions shows that it is impossible that any one of them should be adopted. In my opinion the truth is shortly this: these funds were subscribed to induce the Crown to appoint a Bishop of Natal. The Crown acceded to that wish of the subscribers, and by Letters Patent appointed the plaintiff Bishop of Natal, and the Archbishop of Canterbury has duly consecrated him Bishop of Natal, in compliance with the directions of the Sovereign, and accordingly the plaintiff is Bishop of Natal in every sense of the word,* and will remain so until he dies, or resigns, or until the Letters Patent appointing him are revoked, or until he he is in some manner lawfully deprived of his See.

I cannot, however, conclude the observations I have to make on this case without guarding against a misapprehension which might seem to flow from the words I have last used, as if I were of opinion that the plaintiff could not by any means be removed from being Bishop of Natal. Such is not my opinion. I wish it to be distinctly understood that I do not mean to assert that as soon as the plaintiff's nomination by the Crown and his appointment by Letters Patent had been consummated by his consecration by the Archbishop, whatever might be his conduct or opinion, he must for ever remain Bishop of Natal, and enjoy the endowments attached to that office, even though the Letters Patent appointing him had never been revoked. On the contrary, I entertain no doubt that if he had not performed his part in the contract entered into by him, that if he had failed to comply with "the covenants of his trust," he could not compel payment of his stipend. The contract he has entered into is involved in the words, "Bishop of the Church of England as by law established." The duties, the teaching, the superin-

* Compare p. 180, col. 1, l. 51, p. 193, col. 1, l. 24, and p. 195, col. 1, l. 43.

tendence, the pastoral care, the watching of his flock, which appertain to a Bishop, he undertook and was bound to perform; and if by his own wilful default this has become impossible, I do not mean to lay down that he could maintain a suit in this Court for the payment of his salary as Bishop of Natal. If, for instance, he had renounced the faith of a Christian, or if he had renounced the doctrines and precepts of the Church of England, I do not mean by anything I have stated to suggest that he could have retained his position as Bishop, or have enforced the payment of his salary; in fact, the contrary has been laid down in several cases which have come before this Court, as, for instance, where an endowment was made for a society of Presbyterians in communion with the Church of Scotland, and the ministers and majority of the congregation seceded to the Free Kirk, it has been held that the minority who still clung to the Church of Scotland was entitled to keep the endowment and to appoint another minister; and the like has been decided in many other cases. But, as I observed at the outset of these observations, no such case as that which I have suggested has been presented to me, nor having regard to the pleadings in this suit could such a case have been argued before me. Not a word in the pleadings and evidence before me is breathed against either the moral character or the religious opinions entertained by the plaintiff. Of course it would be foolish in me were I to pretend ignorance of what has been at the root of the proceedings against the plaintiff in Capetown, and of the refusal of the defendants to pay to the plaintiff the income attached to the bishopric of Natal, but judicially in this case, where I am bound to proceed *secundum allegata et probata*, I am bound to ignore this matter altogether. Whether if the case had been raised I should have suspended my judgment on it until proceedings had been taken by *scire facias* in the courts of common law, or until recourse had been had by petition to the Sovereign whom the members of the Church of England in Natal might, as I apprehend, have petitioned on this subject, it is unnecessary for me now to speculate. This I hold certain, that if no other Court could have been found to try the question, I should have been bound to do so; and, consequently, all that it is necessary for me to state on the present occasion is that this question might have been raised, that if raised I must have entertained it, and might have been compelled to decide upon it, but that in the manner in which this case has been presented to me, it is fit that I should repeat once more that I have been compelled to consider it on the assumption that the plaintiff is in every respect perfectly fit and proper to fulfil the office of Bishop and to dispense his pastoral care and protection over the flock of members of the Church of England residing within the Diocese of Natal.

I must, therefore, pronounce a decree in the terms of the prayer of the plaintiff's bill. It follows that the defendants, the trustees, must pay the plaintiff's costs. I do not blame them for the course they have pursued, considering the pressure put on them by or on behalf of the persons who contributed the funds, and who would scarcely have been satisfied if the trustees had acted without the decision of a court of law. It was probably impossible for the trustees to have acted otherwise than they have done. This, however, though it may be a very good reason for holding that they ought to be allowed the expenses to which they will have been put out of the fund which they administer, is no reason for denying the plaintiff his costs, who, so far as this suit is concerned, has in my opinion been in the right throughout.

He must pay the Attorney-General his costs of this suit, and add them to his own costs, which he must recover against the defendants.

There has been no separate answer, or, as I suppose, any extra expense occasioned to either side by the appearance of the Primates, and I say nothing, therefore, with regard to their costs. If there be any such extra costs, I can neither give them any nor require them to pay any.

[NOTE.—*It is somewhat surprising, and very alarming, to observe that the learned Judges should have adopted the wholly unwarrantable and indeed illegal term, "Head of the Church," as applied to the Sovereign no less than six times in the two preceding judgments, viz. in pp.* 182, 190, 197, 206, 210, *the places are designated by the words being printed in italics. That title was deliberately eliminated from the Rolls of Parliament, distinctly repudiated by the Legislature in two successive reigns, and from the year* 1554 *has never belonged to the English Sovereigns. Queen Elizabeth's two reasons for objecting to it are on record:*—1. "*That that dignity has been given to Christ alone, and is not suitable for any mortal.*" 2. "*That such titles have been so foully defiled by Antichrist that they cannot be piously employed by any one for the future.*"]

APPENDIX B.

In this Appendix are contained all the Acts of Parliament affecting Final Ecclesiastical Appeals.

I.

The effects of the following Statute on Final Ecclesiastical Appeals are treated of in Chap. IV., p. 21, sup., and in Chap. VIII., sup., pp. 66, seq.

24 Hen. VIII., cap. 12.—A.D. 1532, o.s.

For the Restraint of Appeals.

The power, pre-eminence, and authority of the King of England.

Where by divers sundry old authentick histories and chronicles, it is manifestly declared and expressed, that this realm of England, is an empire, and so hath been accepted in the world, governed by one supreme head and King, having the dignity and royal estate of the imperial crown of the same; (2) unto whom a body politick, compact of all sorts and degrees of people, divided in terms, and by names of spiritualty and temporalty, been bounden and owen to bear, next to God, a natural and humble obedience; (3) he being also institute and furnished, by the goodness and sufferance of Almighty God, with plenary, whole, and entire power, pre-eminence, authority, prerogative and jurisdiction, to render and yield justice, and final determination to all manner of folk, resiants, or subjects within this his realm, in all causes, matters, debates and contentions, happening to occur, insurge, or begin within the limits thereof, without restraint, or provocation to any foreign princes or potentates of the world; (4) the body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and shewed by that part of the said body politick, called the spiritualty, now being usually called the English Church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity and sufficiency of number, it hath been always thought, and is also at this hour, sufficient and meet of it self, without the intermeddling of an exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties, as to their rooms, spiritual doth appertain; (5) for the due administration whereof, and to keep them from corruption and sinister affection, the King's most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said Church, both with honour and possessions; (6) and the laws temporal, for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without rapine or spoil, was and yet is administered, adjudged and executed by sundry judges and ministers of the other part of the said body politick, called the temporalty; (7) and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other.

The power, learning, and wisdom of the bodyspiritual.

The form and manner of government of the estate temporal.

No appeals shall be used, but within this realm.

II. And whereas the King, his most noble progenitors, and the nobility and commons of this said realm, at divers and sundry parliaments, as well in the time of King Edward the First, Edward the

Third, Richard the Second, Henry the Fourth, and other noble Kings of this realm, made sundry ordinances, laws, statutes, and provisions for the entire and sure conservation of the prerogatives, liberties, and pre-eminences of the said imperial crown of this realm, and of the jurisdiction spiritual and temporal of the same, to keep it from the annoyance as well of the see of Rome, as from the authority of other foreign potentates, attempting the diminution or violation thereof, as often, and from time to time, as any such annoyance or attempt might be known or espied: (2) and notwithstanding the said good statutes and ordinances made in the time of the King's most noble progenitors, in preservation of the authority and prerogative of the said imperial crown, as is aforesaid; yet nevertheless sithen the making of the said good statutes and ordinances divers and sundry inconveniences and dangers, not provided for plainly by the said former acts, statutes and ordinances, have arisen and sprung by reason of appeals sued out of this realm to the see of Rome, in causes testamentary, causes of matrimony and divorces, right of tithes, oblations and obventions, not only to the great inquietation, vexation, trouble, cost and charges of the King's Highness, and many of his subjects and resiants of this his realm, but also to the great delay and let to the true and speedy determination of the said causes, for so much as the parties appealing to the said court of Rome most commonly do the same for the delay of justice. (3) And forasmuch the great distance of way is so far out of this realm, so that the necessary proofs, nor the true knowledge of the cause, can neither there be so well known, ne the witnesses there so well examined, as within this realm, so that the parties grieved by means of the said appeals be most times without remedy: (4) in consideration whereof, the King's Highness, his nobles and commons, considering the great enormities, dangers, long delays and hurts, that as well to his Highness, as to his said nobles, subjects, commons, and resiants of this his realm, in the said causes testamentary, causes of matrimony and divorces, tithes, oblations, and obventions, do daily ensue, doth therefore by his royal assent, and by the assent of the Lords spiritual and temporal, and the commons, in this present Parliament assembled, and by authority of the same, enact, establish and ordain, That all causes testamentary, causes of matrimony and divorces, rights of tithes, oblations and obventions (the knowledge whereof by the goodness of princes of this realm, and by the laws and customs of the same, appertaineth to the spiritual jurisdiction of this realm) already commenced, moved, depending, being, happening, or hereafter coming in contention, debate or question within this realm, or within any the King's dominions, or marches of the same, or elsewhere, whether they concern the King our sovereign lord, his heirs and successors, or any other subjects or resiants within the same, of what degree soever they be, shall be from henceforth heard, examined, discussed, clearly, finally, and definitively adjudged and determined within the King's jurisdiction and authority, and not elsewhere, in such courts spiritual and temporal of the same, as the natures, conditions, and qualities of the cases and matters aforesaid in contention, or hereafter happening in contention, shall require, without having any respect to any custom, use, or sufferance, in hindrance, let, or prejudice of the same, or to any other

The several inconveniencies in suing of appeals to Rome.

All causes determinable by any spiritual jurisdiction shall be adjudged within the King's authority.

thing used or suffered to the contrary thereof by any other manner of person or persons in any manner of wise; any foreign inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, judgments, or any other process or impediments, of what natures, names, qualities, or conditions soever they be, from the see of Rome, of any other foreign courts or potentates of the world, or from and out of this realm, or any other the King's dominions, or marches of the same, to the see of Rome, or to any other foreign courts or potentates, to the let or impediment thereof in any wise notwithstanding. (5) And that it shall be lawful to the King our sovereign lord, and to his heirs and successors, and to all other subjects or resiants within this realm, or within any of the King's dominions or marches of the same, notwithstanding that hereafter it should happen any excommengement, excommunications, interdictions, citations, or any other censures, or foreign process out of any outward parts, to be fulminate, promulged, declared, or put in execution within this said realm, or in any other place or places, for any of the causes before rehearsed, in prejudice, derogation, or contempt of this said Act, and the very true meaning and execution thereof, may and shall nevertheless as well pursue, execute, have, and enjoy the effects, profits, benefits, and commodities of all such processes, sentences, judgments and determinations done, or hereafter to be done, in any of the said courts spiritual or temporal, as the case shall require, within the limits, power and authority of this the King's said realm, and dominions and marches of the same, and those only, and none other to take place, and to be firmly observed and obeyed within the same. (6) As also, that all the spiritual prelates, pastors, ministers, and curates within this realm, and the dominions of the same, shall and may use, minister, execute and do, or cause to be used, executed, ministred and done, all sacraments, sacramentals, divine services, and all other things within the said realm and dominions, unto all the subjects of the same, as Catholick and Christian men owen to do; any former citations, processes, inhibitions, suspensions, interdictions, excommunications, or appeals, for or touching the causes aforesaid, from or to the see of Rome, or any other foreign prince or foreign courts, to the let or contrary thereof in any wise notwithstanding.

The prelates of this realm may execute allsacraments and divine service to the subjects of this realm.

III. And if any of the said spiritual persons, by the occasions of the said fulminations of any of the same interdictions, censures, inhibitions, excommunications, appeals, suspensions, summons, or other foreign citations for the causes beforesaid, or for any of them, do at any time hereafter refuse to minister, or cause to be ministred, the said sacraments and sacramentals, and other divine services, in form as is aforesaid, shall for every such time or times that they or any of them do refuse so to do, or cause to be done, have one year's imprisonment, and to make fine and ransom at the King's pleasure.

The penalty of them who omit to do their duty.

IV. And it is further enacted by the authority aforesaid, That if any person or persons inhabiting or resiant within this realm, or within any of the King's said dominions, or marches of the same, or any other person or persons, of what estate, condition or degree soever he or they be, at any time hereafter, for or in any the causes aforesaid, do attempt, move, purchase, or procure, from or to the see of Rome, or from or to any other foreign court or courts out of this realm, any manner foreign

Whosoever procureth from the see of Rome, &c., any appeals, process, sentences, &c., incur the forfeiture of præmunire.

process, inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, or judgments, of what nature, kind, or quality soever they may be, or execute any of the same process, or do any act or acts to the let, impediment, hindrance or derogation of any process, sentence, judgment or determination had, made, done, or hereafter to be had, done or made, in any courts of this realm, or the King's said dominions, or marches of the same, for any of the causes aforesaid, contrary to the true meaning of this present Act, and the execution of the same, that then every such person or persons so doing, and their fautors, comforters, abettors, procurers, executors, and counsellors, and every of them, being convict of the same, for every such default shall incur and run in the same pains, penalties and forfeitures, ordained and provided by the statute of provision and Præmunire, made in the sixteenth year of the reign of the right noble prince King Richard the Second, against such as attempt, procure, or make provision to the see of Rome, or elsewhere, for any thing or things, to the derogation, or contrary to the prerogative or jurisdiction of the crown and dignity of this realm. 16 R. II. c. 5

V. And furthermore, in eschewing the said great enormities, inquietations, delays, charges and expences hereafter to be sustained in pursuing of such appeals, and foreign process, for and concerning the causes aforesaid, or any of them, do therefore by authority aforesaid, ordain and enact, That in such cases where heretofore any of the King's subjects or resiants have used to pursue, provoke, or procure any appeal to the see of Rome, and in all other cases of appeals, in or for any of the causes aforesaid, they may and shall from henceforth take, have and use their appeals within this realm, and not elsewhere, in manner and form as hereafter ensueth, and not otherwise; that is to say, first from the Archdeacon, or his official, if the matter or cause be there begun, to the Bishop Diocesan of the said see, if in case any of the parties be grieved.

Before whom, and in what courts appeals shall be sued within this realm. 4 Mod. 116, 117. Dyer 209.

VI. And in like wise if it be commenced before the Bishop Diocesan, or his commissary, from the Bishop Diocesan, or his commissary, within fifteen days next ensuing the judgment or sentence thereof there given, to the Archbishop of the Province of Canterbury, if it be within his province; and if it be within the Province of York, then to the Archbishop of York; and so likewise to all other Archbishops in other the King's dominions, as the case by order of justice shall require; and there to be definitively and finally ordered, decreed, and adjudged, according to justice, without any other appellation or provocation to any other person or persons, court or courts.

Appeals ought to be within 15 days.

VII. And if the matter or contention for any of the causes aforesaid be or shall be commenced, by any of the King's subjects or resiants, before the Archdeacon of any Archbishop, or his commissary, then the party aggrieved shall or may take his appeal within fifteen days next after judgment or sentence there given, to the Court of the Arches, or audience, of the same Archbishop or Archbishops; (2) and from the said Court of the Arches, or audience, within fifteen days then next ensuing after judgment or sentence there given, to the Archbishop of the same province, there to be definitively and finally determined, without any other or further process or appeal thereupon to be had or sued.

Suits commenced before an Archbishop shall be determined by him without any further appeal.

VIII. And it is further enacted by the authority aforesaid, that all and every matter, cause and contention now depending, or that hereafter shall be commenced by any of the King's subjects or resiants for any of the causes aforesaid, before any of the said Archbishops, that then the same matter or matters, contention or contentions, shall be before the same Archbishop where the said matter, cause or process shall be so commenced, definitively determined, decreed, or adjudged, without any other appeal, provocation, or any other foreign process out of this realm, to be sued to the let or derogation of the said judgment, sentence or decree, otherwise than is by this Act limited and appointed; (2) saving always the prerogative of the Archbishop and Church of Canterbury, in all the aforesaid causes of appeals, to him and to his successors to be sued within this realm, in such and like wise as they have been accustomed and used to have heretofore.

The prerogative of the Archbishop of Canterbury saved.

Before whom an appeal shall be sued in any cause touching the King.

IX. And in case any cause, matter or contention, now depending for the causes before rehearsed, or any of them, or that hereafter shall come in contention for any of the same causes, in any of the foresaid courts, which hath, doth, shall or may touch the King, his heirs or successors, Kings of this realm; that in all and every such case or cases the party grieved, as before is said, shall or may appeal from any of the said courts of this realm, where the said matter, now being in contention, or hereafter shall come in contention, touching the King, his heirs, or successors (as is aforesaid) shall happen to be ventilate, commenced or begun, to the spiritual prelates and other abbots and priors of the Upper House, assembled and convocate by the King's writ in the Convocation being, or next ensuing within the province or provinces where the same matter of contention is or shall be begun; (2) so that every such appeal be taken by the party grieved within fifteen days next after the judgment or sentence thereupon given or to be given; (3) and that whatsoever be done, or shall be done and affirmed, determined, decreed and adjudged by the foresaid prelates, abbots and priors of the Upper House of the said Convocation, as is aforesaid, appertaining, concerning, or belonging to the King, his heirs, and successors, in any of these foresaid causes of appeals, shall stand and be taken for a final decree, sentence, judgment, definition and determination, and the same matter, so determined, never after to come in question and debate, to be examined in any other court or courts.

X. And if it shall happen any person or persons hereafter to pursue or provoke any appeal contrary to the effect of this Act, or refuse to obey, execute and observe all things comprised within the same, concerning the said appeals, provocations and other foreign processes to be sued out of this realm, for any the causes aforesaid, that then every such person or persons so doing, refusing, or offending contrary to the true meaning of this Act, their procurers, fautors, advocates, counsellors, and abettors, and every of them, shall incur into the pains forfeitures and penalties ordained and provided in the said statute made in the said sixteenth year of King Richard the Second, and with like process to be made against the said offenders, as in the same statute made in the said sixteenth year more plainly appeareth.

16 R. II. c. 5. 28 Hen. VIII. c. 10. Rep. 1 & 2 Ph. & M. c. 8, and revived by 1 Eliz. c. 1.

II.

The effects of the following Statute on Final Ecclesiastical Appeals are treated of in Chap. IV., p. 21, sup., and in Chap. IX. sup., pp. 84, seq.

25 Hen. VIII., cap. 19.—A.D. 1533, o.s.

The Submission of the Clergy, and Restraint of Appeals.

Where the King's humble and obedient subjects, the clergy of this realm of England, have not only knowledged according to the truth, that the Convocations of the same clergy, is, always hath been, and ought to be assembled only by the King's writ, but also submitting themselves to the King's Majesty, have promised in Verbo Sacerdotii, that they will never from henceforth presume to attempt, allege, claim or put in ure, or enact, promulge or execute any new canons, constitutions, ordinance provincial, or other, or by whatsoever other name they shall be called, in the Convocation, unless the King's most royal assent and licence may to them be had, to make, promulge and execute the same; and that his Majesty do give his most royal assent and authority in that behalf: (2) and where divers constitutions, ordinances and canons provincial or synodal, which heretofore have been enacted, and be thought not only to be much prejudicial to the King's prerogative royal, and repugnant to the laws and statutes of this realm, but also overmuch onerous to his Highness and his subjects; the said clergy hath most humbly besought the King's Highness, that the said constitutions and canons may be committed to the examination and judgment of his Highness, and of two and thirty persons of the King's subjects, whereof sixteen to be of the upper and nether house of the parliament of the temporalty, and the other sixteen to be of the clergy of this realm; and all the said two and thirty persons to be chosen and appointed by the King's Majesty; (3) and that such of the said constitutions and canons, as shall be thought and determined by the said two and thirty persons, or the more part of them, worthy to be abrogated and adnulled, shall be abolite and made of no value accordingly; (4) and such other of the same constitutions and canons, as by the said two and thirty, or the more part of them, shall be approved to stand with the laws of God, and consonant to the laws of this realm, shall stand in their full strength and power, the King's most royal assent first had and obtained to the same; (5) be it therefore now enacted by authority of this present parliament, according to the said submission and petition of the said clergy, That they ne any of them from henceforth shall presume to attempt, allege, claim or put in ure any constitutions or ordinances provincial or synodal, or any other canons; nor shall enact, promulge or execute any such canons, constitutions or ordinances provincial, by whatsoever name or names they may be called, in their Convocations in time coming (which alway shall be assembled by authority of the King's writ) unless the same clergy may have the King's most royal assent and licence to make, promulge and execute such canons, constitutions and ordinances provincial or synodal, (6) upon pain of every one of the said clergy

Several canons have been prejudicial to the King's prerogative, and to the laws and statutes of this realm.

The clergy shall not enact any constitutions or ordinances without the King's assent.

The convocation shall be assembled by the King's writ.

doing contrary to this Act, and being thereof convict, to suffer imprisonment, and make fine at the King's will.

II. And forasmuch as such canons, constitutions and ordinances, as heretofore have been made by the clergy of this realm, cannot now at the session of this present Parliament, by reason of shortness of time, be viewed, examined and determined by the King's Highness, and thirty-two persons to be chosen and appointed according to the petition of the said clergy in form above rehearsed: be it therefore enacted by authority aforesaid, That the King's Highness shall have power and authority to nominate and assign, at his pleasure, the said two and thirty persons of his subjects, whereof sixteen to be of the clergy, and sixteen to be of the temporalty of the upper and nether house of the Parliament; and if any of the said two and thirty persons so chosen shall happen to die before their full determination, then his Highness to nominate other from time to time of the said two houses of the Parliament, to supply the number of the said two and thirty; (2) and that the same two and thirty, by his Highness so to be named, shall have power and authority to view, search and examine the said canons, constitutions and ordinances provincial and synodal heretofore made, and such of them as the King's Highness and the said two and thirty, or the more part of them, shall deem and adjudge worthy to be continued, kept and obeyed, shall be from thenceforth kept, obeyed and executed within this realm, so that the King's most royal assent under his great seal be first had to the same; (3) and the residue of the said canons, constitutions and ordinances provincial, which the King's Highness, and the said two and thirty persons, or the more part of them, shall not approve, or deem and judge worthy to be abolite, abrogate and made frustrate, shall from thenceforth be void and of none effect, and never be put in execution within this realm. (4) Provided alway, That no canons, constitutions or ordinances shall be made or put in execution within this realm by authority of the Convocation of the clergy, which shall be contrariant or repugnant to the King's prerogative royal, or the customs, laws or statutes of this realm; anything contained in this Act to the contrary hereof notwithstanding.

The King may assign 32 persons to examine the canons, and to continue such as they think worthy, and to abridge the residue.
EXP.
35 Hen. VIII. c. 16. 3 & 4 Ed. VI. c. 11.
3 Inst. 39.
Hob. 148.
13 Co. 47.
2 Roll. 481.
2 Lev. 222.

No canons shall be executed which be contrary to the King's prerogative, or to the laws.
3 Inst. 178.

III. And be it further enacted by authority aforesaid, That from the feast of Easter, which shall be in the year of our Lord God 1534, no manner of appeals shall be had, provoked, or made out of this realm, or out of any the King's dominions, to the Bishop of Rome, nor to the see of Rome, in any causes or matters happening to be in contention, and having their commencement and beginning in any of the courts within this realm, or within any the King's dominions, of what nature, condition or quality soever they be of; but that all manner of appeals, of what nature or condition soever they be of, or what cause or matter soever they concern, shall be made and had by the parties grieved, or having cause of appeal, after such manner, form and condition, as is limited for appeals to be had and prosecuted within this realm in causes of matrimony, tythes, oblations and obventions, by a statute thereof made and established sithen the beginning of this present Parliament, and according to the form and effect of the said estatute; any usage, custom, prescription, or any thing or things to the contrary hereof notwithstanding.

There shall be no appeals to Rome, but appeals shall be according to the statute made 24 Hen. VIII. c. 12.

IV. And for lack of justice at or in any the courts of the Archbishops of this realm, or in any the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery; (2) and that upon every such appeal, a Commission shall be directed under the great seal to such persons as shall be named by the King's Highness, his heirs or successors, like as in case of appeal from the Admiral's Court, to hear and definitively determine such appeals, and the causes concerning the same. (3) Which Commissioners, so by the King's Highness, his heirs or successors, to be named or appointed, shall have full power and authority to hear and definitively determine every such appeal, with the causes and all circumstances concerning the same; and that such judgment and sentence, as the said Commissioners shall make and decree, in and upon any such appeal, shall be good and effectual, and also definitive; and no further appeals to be had or made from the said Commissioners for the same.

Appeals from the Archbishop's Court into the Chancery. 4 Mod. 117. Dyer 209.

V. And if any person or persons, at any time after the said feast of Easter, provoke or sue any manner of appeals, of what nature or condition soever they be of, to the said Bishop of Rome, or to the see of Rome, or do procure or execute any manner of process from the see of Rome, or by authority thereof, to the derogation or let of the execution of this Act, or contrary to the same, that then every such person or persons so doing, their aiders, counsellors and abettors, shall incur and run into the dangers, pains and penalties contained and limited in the Act of provision and Præmunire made in the sixteenth year of the King's most noble progenitor, King Richard the Second, against such as sue to the court of Rome against the King's crown and prerogative royal.

Præmunire for suing of appeals to Rome, or executing any process from thence. 16 R. II. 5.

VI. Provided always, That all manner of provocations and appeals hereafter to be had, made or taken from the jurisdiction of any abbots, priors, or other heads and governors of monasteries, abbeys, priories and other houses and places exempt, in such cases as they were wont or might afore the making of this Act, by reason of grants or liberties of such places exempt, to have or make immediately any appeal or provocation to the Bishop of Rome, otherwise called Pope, or to the see of Rome, that in all these cases every person and persons, having cause of appeal or provocation, shall and may take and make their appeals and provocations immediately to the King's Majesty of this realm, into the Court of Chancery, in like manner and form as they used afore to do to the see of Rome; (2) which appeals and provocations so made, shall be definitively determined by authority of the King's commission, in such manner and form as in this Act is abovementioned; (3) so that no Archbishop or Bishop of this realm shall intermit or meddle with any such appeals, otherwise or in any other manner than they might have done afore the making of this Act; any thing in this Act to the contrary thereof notwithstanding.

Appeals from places exempt, which were to the see of Rome, shall now be into Chancery.

VII. Provided also, That such canons, constitutions, ordinances and synodals provincial being already made, which be not contrariant or repugnant to the laws, statutes and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed as they were afore the making of this Act, till such time as they be viewed, searched, or otherwise ordered and determined by

What canons, &c., are still in force. 27 Hen. VIII. c. 20. 37 Hen. VII. c. 17. s. 2. Repealed by 1 & 2 Ph. & M. c. 8, and revived by 1 Eliz. c. 1. s. 10.

the said two and thirty persons, or the more part of them, according to the tenor, form and effect of this present Act.

III.

The effects of the following Statute on Final Ecclesiastical Appeals are treated of in Chap. X. sup., pp. 91, seq.

2 & 3 Will. IV., cap. 92.—A.D. 1832.

An Act for transferring the Powers of the High Court of Delegates, both in Ecclesiastical and Maritime Causes, to His Majesty in Council. [*7th August*, 1832.]

25 Hen. VIII. c. 19.

Whereas by an Act passed in the twenty-fifth year of the reign of King Henry the Eighth, and intituled "The Submission of the Clergy and Restraint of Appeals," it is (amongst other things) provided, that for lack of justice at or in any of the Courts of the Archbishops of this realm, or in any of the King's dominions, it should be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery; and that upon every such appeal a Commission should be directed under the Great Seal to such persons as should be named by the King's Highness, his heirs or successors, like as in case of appeal from the Admiral's Court, to hear and definitively determine such appeals, and the causes concerning the same; which Commissioners so by the King's Highness, his heirs or successors, to be named or appointed, should have full power and authority to hear and definitively determine every such appeal, with the causes and all circumstances concerning the same; and that such judgment and sentence as the said Commissioners should make and decree in and upon any such appeal should be good and effectual, and also definitive, and that no further appeals should be had or made from the said Commissioners for the same; and that all manner of provocations and appeals thereafter to be had, made, or taken, from the jurisdiction of any abbots, priors, or other heads and governors of monasteries, abbeys, priories, and other houses and places exempt, in such cases as they were wont or might afore the making of the Act now in recital, by reason of grants or liberties of such places exempt, to have or make immediately any appeal or provocation to the Bishop of Rome, otherwise called Pope, or to the See of Rome; in all those cases every person and persons having cause of appeal or provocation should and might take and make their appeals and provocations immediately to the King's Majesty of this realm, into the Court of Chancery, in the manner and form as they used afore to do to the See of Rome; which appeals and provocations so made should be definitively determined by authority of the King's Commission in such manner and form as was in the said Act now in recital above mentioned, so that no Archbishop or Bishop of this realm should intermit or meddle with any such appeals otherwise or in any other manner than they might have done afore the making of the Act now in recital; any thing in the Act now in recital to the contrary thereof notwithstanding: And whereas by an Act passed in the eighth year of the reign of Queen Elizabeth, and intituled "For the Avoiding

8 Eliz. c. 5.

of tedious Suits in Civil and Marine Causes," it is provided that every such judgment and sentence definitive as should be given and pronounced in any Civil and Marine cause, upon appeal lawfully to be made therein to the Queen's Majesty in Her Highness' Court of Chancery, by such Commissioners or delegates as should be nominated and appointed by Her Majesty, her heirs or successors, by Commission under the Half Seal, as it had been theretofore used in such cases, should be final, and that no further appeal should be made from the said judgment or sentence definitive, or from the said Commissioners or delegates, for or in the same; any law, usage, or custom to the contrary notwithstanding: And whereas the persons who from time to time have been appointed Commissioners by commission under the Great Seal or under the Half Seal, by virtue of the authority of either of the hereinbefore-recited Acts, have been commonly called "The High Court of Delegates:" And whereas, notwithstanding the hereinbefore-recited Acts, the King's Majesty for the time being hath out of his royal favour occasionally granted, upon petition to him in Council made for that purpose, a Commission under the Great Seal authorizing the Commissioners therein named to review the judgments and decrees of the High Court of Delegates so appointed as aforesaid: And whereas it is expedient that the hereinbefore-recited Act of the eighth year of Queen Elizabeth, and also so much of the hereinbefore-recited Act of the twenty-fifth year of King Henry the Eighth as relates to the appeal to His Majesty in Chancery, should be repealed, and that all the powers which by virtue of either of the said Acts have or might have been enjoyed by the said High Court of Delegates should be in future exercised by his Majesty in Council, and that no such Commission of Review as aforesaid should hereafter be granted; be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the hereinbefore-recited Act of the twenty-fifth year of the reign of King Henry the Eighth, so far as relates to any power thereby given to appeal in any case to the King's Majesty in his High Court of Chancery, and so far as the same empowers his Majesty to grant a Commission under the Great Seal authorizing the persons therein named to hear and determine such appeals, shall, as from the first day of February one thousand eight hundred and thirty-three, be and the same is hereby repealed.

25 Hen. VIII. c. 19, so far as relates to the Power of Appeal and to the Appointment of Delegates, repealed from 1 Feb. 1833.

II. And be it also enacted, That the hereinbefore-recited Act of the eighth year of the reign of Queen Elizabeth shall, as from the first day of February one thousand eight hundred and thirty-three, be and the same is hereby repealed.

8 Eliz. c. 5. repealed from 1 Feb. 1833.

III. And be it further enacted, That from and after the said first day of February one thousand eight hundred and thirty-three it shall be lawful to and for every person who might heretofore, by virtue of either of the said recited Acts, have appealed or made suit to his Majesty in his High Court of Chancery, to appeal or make suit to the King's Majesty, his heirs or successors, in Council, within such time, in such manner, and subject to such rules, orders, and regulations for the due and more convenient proceeding, as shall seem meet and necessary, and upon such security, if any, as his Majesty, his heirs and

From 1 Feb. 1833 Powers of the High Court of Delegates transferred to the King in Council; and no Commission of Review to be thereafter granted.

successors, shall from time to time by Order in Council direct; and that the King's Majesty, his heirs and successors, in Council, shall thereupon have power to proceed to hear and determine every appeal and suit so to be made by virtue of this Act, and to make all such judgments, orders, and decrees in the matter of such appeal or suit as might heretofore have been made by his Majesty's Commissioners appointed by virtue of either of the hereinbefore-recited Acts if this Act had not been passed; and that every such judgment, order, and decree so to be made by the King's Majesty, his heirs and successors, shall have such and the like force and effect in all respects whatsoever as the same respectively would have had if made and pronounced by the aforesaid High Court of Delegates; and that every such judgment, order, and decree shall be final and definitive, and that no Commission shall hereafter be granted or authorized to review any judgment or decree to be made by virtue of this Act.

Proviso for Appeals now pending, or which may be pending previous to 1 Feb. 1833.

IV. Provided always, and be it enacted, That nothing herein contained shall extend to affect any appeal now pending, or which before the said first day of February one thousand eight hundred and thirty-three may be pending, to his Majesty in Chancery, by virtue of either of the hereinbefore-recited Acts, or to affect the right of his Majesty to grant any such Commission under the Great Seal or under the Half Seal as aforesaid, to hear and adjudicate upon any appeal so now pending, or which may before the said first day of February one thousand eight hundred and thirty-three be pending; and that every judgment or decree of the said High Court of Delegates, by virtue of either of the said recited Acts, already made or hereafter to be made, in any cause so now pending or which shall be so pending as aforesaid, shall have such and the like force and effect in all respects as if this Act had not been passed.

IV.

The effects of the following Statute on Final Ecclesiastical Appeals are treated of in Chap. VI., p. 51, sup., VII., pp. 64, 65, and in XI., pp. 94, seq.

3 & 4 Will. IV., cap. 41.—A.D. 1833.

An Act for the better Administration of Justice in his Majesty's Privy Council. [14*th August*, 1833.]

2 & 3 Will. IV. c. 92.

Whereas by virtue of an Act passed in a session of Parliament of the second and third years of the reign of his present Majesty, intituled "An Act for transferring the powers of the High Court of Delegates, both in Ecclesiastical and Maritime causes, to his Majesty in Council," it was enacted, that from and after the first day of February one thousand eight hundred and thirty-three it should be lawful for every person who might theretofore, by virtue either of an Act passed in the twenty-fifth year of the reign of King Henry the Eighth, intituled "The Submission of the Clergy and Restraint of Appeals," or of an Act passed in the eighth year of the reign of Queen Elizabeth, intituled "For the Avoiding of tedious Suits in Civil and Marine Causes," have appealed or made suit to his Majesty in his High Court of Chancery, to appeal or make suit to the King's Majesty, his heirs

25 Hen. VIII. c. 19.

8 Eliz. c. 5.

or successors, in Council, within such time, in such manner, and subject to such rules, orders, and regulations for the due and more convenient proceeding, as should seem meet and necessary, and upon such security, if any, as his Majesty, his heirs and successors, should from time to time by Order in Council direct: And whereas, by Letters Patent under the Great Seal of Great Britain, certain persons, members of his Majesty's Privy Council, together with others, being judges and barons of his Majesty's Courts of Record of Westminster, have been from time to time appointed to be his Majesty's Commissioners for receiving, hearing, and determining appeals from his Majesty's Courts of Admiralty in causes of Prize: And whereas, from the decisions of various Courts of Judicature in the East Indies, and in the plantations, colonies, and other dominions of his Majesty abroad, an appeal lies to his Majesty in Council: And whereas matters of Appeal or petition to his Majesty in Council have usually been heard before a Committee of the whole of his Majesty's Privy Council, who have made a report to his Majesty in Council, whereupon the final judgment or determination hath been given by his Majesty; And whereas it is expedient to make certain provisions for the more effectual hearing and reporting on appeals to his Majesty in Council and on other matters, and to give such powers and jurisdiction to his Majesty in Council as hereinafter mentioned: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That the President for the time being of his Majesty's Privy Council, the Lord High Chancellor of Great Britain for the time being, and such of the members of his Majesty's Privy Council as shall from time to time hold any of the offices following, that is to say, the office of Lord Keeper or First Lord Commissioner of the Great Seal of Great Britain, Lord Chief Justice or Judge of the Court of King's Bench, Master of the Rolls, Vice-Chancellor of England, Lord Chief Justice or Judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, Judge of the Prerogative Court of the Lord Archbishop of Canterbury, Judge of the High Court of Admiralty, and Chief Judge of the Court in Bankruptcy, and also all persons, members of his Majesty's Privy Council, who shall have been President thereof or held the office of Lord Chancellor of Great Britain, or shall have held any of the other offices hereinbefore mentioned, shall form a Committee of his Majesty's said Privy Council, and shall be styled "The Judicial Committee of the Privy Council:" Provided nevertheless, that it shall be lawful for his Majesty from time to time, as and when he shall think fit, by his sign manual, to appoint any two other persons, being Privy Councillors, to be members of the said Committee.

Certain persons to form a Committee, to be styled "The Judicial Committee of the Privy Council."

II. And be it further enacted, That from and after the first day of June one thousand eight hundred and thirty-three, all appeals or applications in Prize suits and in all other suits or proceedings in the Courts of Admiralty, or Vice-Admiralty Courts, or any other Court in the plantations in America and other his Majesty's dominions or elsewhere abroad, which may now, by virtue of any law, statute, commission, or usage, be made to the High Court of Admiralty in England,

Appeals from Vice-Admiralty Courts abroad, &c., to be made to the King in Council.

or to the Lords Commissioners in Prize cases, shall be made to his Majesty in Council, and not to the said High Court of Admiralty in England or to such Commissioners as aforesaid; and such appeals shall be made in the same manner and form and within such time wherein such appeals might, if this Act had not been passed, have been made to the said High Court of Admiralty or to the Lords Commissioners in Prize cases respectively; and that all laws or statutes now in force with respect to any such appeals or applications shall apply to any appeals to be made in pursuance of this Act to his Majesty in Council.

All Appeals from sentence of any judge, &c., to be referred by his Majesty to the Committee, to report thereon.

III. And be it further enacted, That all appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before his Majesty or his Majesty in Council from or in respect of the determination, sentence, rule, or order of any Court, judge, or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by his Majesty to the said Judicial Committee of his Privy Council, and that such appeals, causes, and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to his Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by his Majesty to the whole of his Privy Council or a Committee thereof (the nature of such report or recommendation being always stated in open Court).

His Majesty may refer any other matters to Committee.

IV. And be it further enacted, That it shall be lawful for his Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as his Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise his Majesty thereon in manner aforesaid.

No matter to be heard unless in presence of four members of the Committee.

V. And be it further enacted, That no matter shall be heard, nor shall any order, report, or recommendation be made, by the said Judicial Committee, in pursuance of this Act, unless in the presence of at least four members of the said Committee; and that no report or recommendation shall be made to his Majesty unless a majority of the members of such Judicial Committee present at the hearing shall concur in such report or recommendation: Provided always, that nothing herein contained shall prevent his Majesty, if he shall think fit, from summoning any other of the members of his said Privy Council to attend the meetings of the said Committee.

In case the King directs the attendance of any judge, a member of the Committee, the other judges of the Court to which he belongs to make arrangements with regard

VI. And be it further enacted, That in case his Majesty shall be pleased, by directions under his sign manual, to require the attendance at the said Committee for the purposes of this Act of any member or members of the said Privy Council who shall be a judge or judges of the Court of King's Bench, or of the Court of Common Pleas, or of the Court of Exchequer, such arrangements for dispensing with the attendance of such judge or judges upon his or their ordinary duties during the time of such attendance at the Privy Council as aforesaid shall be made by the judges of the Court or Courts to which such judge or judges shall belong respectively in regard to the business of the Court and by the judges of the said three Courts, or by any eight or more of such judges, including the chiefs of the several Courts, in

regard to all other duties, as may be necessary and consistent with the public service. to the business of the Court.

VII. And be it enacted, That it shall be lawful for the said Judicial Committee, in any matter which shall be referred to such Committee, to examine witnesses by word of mouth (and either before or after examinations by deposition), or to direct that the depositions of any witness shall be taken in writing by the Registrar of the said Privy Council to be appointed by his Majesty as hereinafter mentioned, or by such other person or persons, and in such manner, order, and course, as his Majesty in Council, or the said Judicial Committee shall appoint and direct; and that the said Registrar and such other person or persons so to be appointed shall have the same powers as are now possessed by an Examiner of the High Court of Chancery or of any Court Ecclesiastical. Evidence may be taken *vivâ voce*, or upon written depositions.

VIII. And be it enacted, That in any matter which shall come before the said Judicial Committee it shall be lawful for the said Committee to direct that such witnesses shall be examined or re-examined, and as to such facts as to the said Committee shall seem fit, notwithstanding any such witness may not have been examined, or no evidence may have been given on any such facts in a previous stage of the matter; and it shall also be lawful for his Majesty in Council, on the recommendation of the said Committee, upon any appeal, to remit the matter which shall be the subject of such appeal to the Court from the decision of which such appeal shall have been made, and at the same time to direct that such Court shall re-hear such matter, in such form, and either generally or upon certain points only, and upon such re-hearing take such additional evidence, though before rejected, or reject such evidence before admitted, as his Majesty in Council shall direct; and further, on any such remitting or otherwise, it shall be lawful for his Majesty in Council to direct that one or more feigned issue or issues shall be tried in any Court in any of his Majesty's dominions abroad, for any purpose for which such issue or issues shall to his Majesty in Council seem proper. Committee may order any particular witnesses to be examined, and as to any particular facts, and may remit causes for rehearing.

IX. And be it enacted, That every witness who shall be examined in pursuance of this Act shall give his or her evidence upon oath, or if a Quaker or Moravian upon solemn affirmation, which oath and affirmation respectively shall be administered by the said Judicial Committee and Registrar, and by such other person or persons as his Majesty in Council or the said Judicial Committee shall appoint; and that every such witness who shall wilfully swear or affirm falsely shall be deemed guilty of perjury, and shall be punished accordingly. Witnesses to be examined on oath, and to be liable to punishment for perjury.

X. And be it enacted, That it shall be lawful for the said Judicial Committee to direct one or more feigned issue or issues to be tried in any Court of Common Law, and either at Bar, before a Judge of Assize, or at the sittings for the trial of issues in London or Middlesex, and either by a special or common jury, in like manner and for the same purpose as is now done by the High Court of Chancery. Committee may direct an issue to try any fact;

XI. And be it enacted, That it shall be in the discretion of the said Judicial Committee to direct that, on the trial of any such issue, the depositions already taken of any witness who shall have died, or who shall be incapable to give oral testimony, shall be received in evidence; and further, that such deeds, evidences, and writings shall may, in certain cases, direct depositions to be read at the trial of the issue;

be produced, and that such facts shall be admitted, as to the said Committee shall seem fit.

may make such orders as to the admission of evidence as are made by the Court of Chancery;

XII. And be it enacted, That it shall be lawful for the said Judicial Committee to make such and the like orders respecting the admission of persons, whether parties or others, to be examined as witnesses upon the trial of any such issues as aforesaid, as the Lord High Chancellor or the Court of Chancery has been used to make respecting the admission of witnesses upon the trial of issues directed by the Lord Chancellor or the Court of Chancery.

and may direct new trials of issues.

XIII. And be it enacted, That it shall be lawful for the said Judicial Committee to direct one or more new trial or new trials of any issue, either generally or upon certain points only; and that in case any witness examined at a former trial of the same issue shall have died, or have, through bodily or mental disease or infirmity, become incapable to repeat his testimony, it shall be lawful for the said Committee to direct that parol evidence of the testimony of such witness shall be received.

Powers, &c., of 13 Geo. III. c. 63, and 1 Will. IV. c. 22, with regard to examination of witnesses applied to the Judicial Committee.

XIV. And whereas by an Act passed in the thirteenth year of his late Majesty King George the Third, and intituled, "An Act for establishing certain Regulations for the better management of the Affairs of the East India Company, as well in India as in Europe," and by an Act passed in the first year of the reign of his present Majesty, and intituled "An Act to enable the Courts of Law to order the examination of witnesses upon interrogatories and otherwise," certain powers are given to certain Courts therein mentioned to enforce, and provisions are made for the examination of witnesses by commission, upon interrogatories and otherwise; be it therefore further enacted, That all the powers and provisions contained in the two last-mentioned Acts, or either of them, shall extend to and be exercised by the said Judicial Committee in all respects as if such Committee had been therein named as one of his Majesty's Courts of Law at Westminster.

Costs to be in the discretion of the Committee.

XV. And be it enacted, That the costs incurred in the prosecution of any appeal or matter referred to the said Judicial Committee, and of such issues as the same Committee shall under this Act direct, shall be paid by such party or parties, person or persons, and be taxed by the aforesaid Registrar, or such other person or persons, to be appointed by his Majesty in Council or the said Judicial Committee, and in such manner as the said Committee shall direct.

Decrees to be enrolled.

XVI. And be it further enacted, That the orders or decrees of his Majesty in Council made, in pursuance of any recommendation of the said Judicial Committee, in any matter of appeal from the judgment or order of any Court or judge, shall be enrolled, for safe custody, in such manner, and the same may be inspected and copies thereof taken under such regulations as his Majesty in Council shall direct.

Committee may refer matters to Registrar in same manner as matters are by Court of Chancery referred to a Master.

XVII. And be it further enacted, That it shall be lawful for the said Committee to refer any matters to be examined and reported on to the aforesaid Registrar, or to such other person or persons as shall be appointed by his Majesty in Council or by the said Judicial Committee, in the same manner and for the like purposes as matters are referred by the Court of Chancery to a Master of the said Court; and that for the purposes of this Act the said Registrar and the said per-

son or persons so to be appointed shall have the same powers and authorities as are now possessed by a Master in Chancery.

The King may appoint Registrar.

XVIII. And be it further enacted, That it shall be lawful for his Majesty, under his sign manual, to appoint any person to be the Registrar of the said Privy Council, as regards the purposes of this Act, and to direct what duties shall be performed by the said Registrar.

Attendance of witnesses, and production of papers, &c., may be compelled by Subpœna.

XIX. And be it further enacted, That it shall be lawful for the President for the time being of the said Privy Council to require the attendance of any witnesses, and the production of any deeds, evidences, or writings, by writ to be issued by such President in such and the same form, or as nearly as may be, as that in which a writ of Subpœna *ad testificandum* or of Subpœna *duces tecum* is now issued by his Majesty's Court of King's Bench at Westminster; and that every person disobeying any such writ so to be issued by the said President shall be considered as in contempt of the said Judicial Committee, and shall also be liable to such and the same penalties and consequences as if such writ had issued out of the said Court of King's Bench, and may be sued for such penalties in the said Court.

Time of appealing.

XX. And be it further enacted, That all appeals to his Majesty in Council shall be made within such times respectively within which the same may now be made, where such time shall be fixed by any law or usage, and where no such law or usage shall exist, then within such time as shall be ordered by his Majesty in Council; and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for his Majesty in Council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to his Majesty in Council.

Decrees for Courts abroad to be carried into effect as the King in Council shall direct.

XXI. And be it further enacted, That the order or decree of his Majesty in Council on any appeal from the order, sentence, or decree of any court of justice in the East Indies, or of any colony, plantation, or other his Majesty's dominions abroad, shall be carried into effect in such manner, and subject to such limitations and conditions, as his Majesty in Council shall, on the recommendation of the said Judicial Committee, direct; and it shall be lawful for his Majesty in Council, on such recommendation, by order, to direct that such court of justice shall carry the same into effect accordingly, and thereupon such court of justice shall have the same powers of carrying into effect and enforcing such order or decree as are possessed by or are hereby given to his Majesty in Council: Provided always, that nothing in this Act contained shall impeach or abridge the powers, jurisdiction, or authority of his Majesty's Privy Council as heretofore exercised by such Council, or in anywise alter the constitution or duties of the said Privy Council, except so far as the same are expressly altered by this Act, and for the purposes aforesaid.

Act not to abridge powers of Privy Council.

His Majesty may direct the East India Company to bring on Appeals from the Sudder Dewanny Adaw-

XXII. And whereas various appeals to his Majesty in Council from the Courts of Sudder Dewanny Adawlut at the several Presidencies of Calcutta, Madras, and Bombay in the East Indies, have been admitted by the said Courts, and the transcripts of the proceedings in appeal have been from time to time transmitted under the Seal of the said Courts, through the United Company of Merchants in England trading to the East Indies, to the office of his Majesty's said Privy

lut Courts to a hearing.

Council, but the suitors in the causes so appealed have not taken the necessary measures to bring on the same to a hearing; be it therefore further enacted by the authority aforesaid, That it shall be lawful for his Majesty in Council to give such directions to the said United Company and other persons for the purpose of bringing to a hearing before the said Committee the several cases appealed or hereafter to be appealed to his Majesty in Council from the several Courts of Sudder Dewanny Adawlut in the East Indies, and for appointing agents and counsel for the different parties in such appeals, and to make such orders for security and payment of the costs thereof, as his Majesty in Council shall think fit; and thereupon such appeals shall be heard and reported on to his Majesty in Council, and shall be by his Majesty in Council determined in the same manner, and the judgments, orders, and decrees of his Majesty in Council thereon shall be of the same force and effect, as if the same had been brought to a hearing by the direction of the parties appealing in the usual course of proceeding: Provided always, that such last-mentioned powers shall not extend to any appeals from the said Courts of Sudder Dewanny Adawlut other than appeals in which no proceedings have been or shall hereafter be taken in England on either side for a period of two years subsequent to the admission of the appeal by such Court of Sudder Dewanny Adawlut.

Orders made on such Appeals to have effect notwithstanding death of parties, &c.

XXIII. And be it enacted, That in any case where any order shall have been made on any such appeal as last aforesaid, the same shall have full force and effect notwithstanding the death of any of the parties interested therein; but that in all cases where any such appeal may have been withdrawn or discontinued, or any compromise made in respect of the matter in dispute, before the hearing thereof, then the determination of his Majesty in Council in respect of such appeal shall have no effect.

His Majesty empowered to make orders for regulating the mode, &c., of such Appeals.

XXIV. And be it further enacted, That it shall be lawful for his Majesty in Council from time to time to make any such rules and orders as may be thought fit for the regulating the mode, form, and time of appeal to be made from the decisions of the said Courts of Sudder Dewanny Adawlut, or any other Courts of Judicature in India or elsewhere to the eastward of the Cape of Good Hope (from the decisions of which an appeal lies to his Majesty in Council), and in like manner from time to time to make such other regulations for the preventing delays in the making or hearing such appeals, and as to the expenses attending the said appeals, and as to the amount or value of the property in respect of which any such appeal may be made.

His Majesty empowered to appoint one of the Barons of the Court of Exchequer to sit in Equity in the absence of the Chief Baron.

XXV. And whereas by an Act of Parliament passed in the fifty-seventh year of the reign of his Majesty King George the Third, intituled "An Act to facilitate the hearing and determining of suits in Equity in his Majesty's Court of Exchequer at Westminster," it was enacted that the Lord Chief Baron of the said Court for the time being should have power to hear and determine all causes, matters, and things which should be at any time depending in the said Court of Exchequer as a court of equity, and that if the said Lord Chief Baron of the Court of Exchequer should by sickness or any other unavoidable cause be prevented from sitting on the Equity side of the said Court for the purposes in the said Act mentioned, then it should and might

be lawful for his Majesty and his successors to nominate and appoint from time to time by warrant under the Royal sign manual, revocable at pleasure, any one other of the barons of the degree of the coif of the said Court for the time being, to hear and determine the causes, matters, and things in the said Act mentioned: And whereas by reason of the great increase of business on the Common Law or Plea side of the said Court of Exchequer, the Lord Chief Baron is prevented from giving so much time as heretofore to the sittings on the Equity side of the said Court, and the sittings on such Equity side of the said Court being necessarily suspended during the absence of the Lord Chief Baron, great inconvenience is thereby sustained by the suitors and practitioners on the Equity side of the said Court: And whereas the Lord Chief Baron may by this Act become liable to the performance of other additional duties unconnected with the said Court of Exchequer, and it is desirable that the said Court of Exchequer should sit as a Court of Equity without any unnecessary interruption, for the purpose of hearing and determining causes, matters, and things depending in the said Court as a Court of Equity: And whereas doubts have arisen whether or not the above-recited Act extends to cases of the Lord Chief Baron being prevented from sitting by the performance of judicial duties elsewhere: be it therefore declared and enacted, That it shall and may be lawful for his Majesty and his successors to nominate and appoint from time to time by warrant under the royal sign manual, revocable at pleasure, any one of the Barons of the degree of the coif of the said Court for the time being to hear and determine (on such days as the Lord Chief Baron of the said Court shall sit on the Common Law side of the said Court during the term, or shall preside at the sittings at Nisi Prius in London or Middlesex after the term, or shall attend at the Judicial Committee of his Majesty's Privy Council under the provisions of this Act) all causes, matters, and things which shall at any time be depending in the said Court of Exchequer as a Court of Equity.

Two judges of the Court of Bankruptcy to act for the Chief judge of the Court of Review during his attendance at the said Judicial Committee.

XXVI. And be it further enacted, That during the absence of the Chief Judge in Bankruptcy from the Court of Review established by virtue of an Act passed in the first and second year of his present Majesty intituled "An Act to establish a Court in Bankruptcy," by reason of his attendance at the said Judicial Committee by virtue of this Act, any two judges of the said Court shall and may form a Court of Review in Bankruptcy, and shall and may make, do, and execute all orders, acts, matters, powers, and things whatsoever which by virtue of the said Act the judges of the said Court or any three of them are authorized to make, do or execute, and in all respects whatsoever as if three of the said judges were present, except that nothing herein contained shall authorize any two judges of the said Court to hear and determine any matter brought under the review of the said Court by way of Appeal from the determination or decision of any Commissioner or Subdivision Court appointed by virtue of the said Act.

Powers of Act 57 Geo. III. extended to this Act.

XXVII. And be it further enacted, That all the clauses and provisions contained in the said Act of Parliament which relate to the Baron nominated and appointed under that Act shall apply and be extended to the Baron nominated and appointed under the authority of this Act.

Power of enforcing decrees.

XXVIII. And be it enacted, That the said Judicial Committee shall have and enjoy in all respects such and the same power of punishing contempts and of compelling appearances, and that his Majesty in Council shall have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders as are now exercised by the High Court of Chancery or the Court of King's Bench (and both *in personam* and *in rem*), or as are given to any Court Ecclesiastical by an Act of Parliament passed in a session of Parliament of the second and third years of the reign of his present Majesty, intituled "An Act for enforcing the process upon Contempts in the Courts Ecclesiastical of England and Ireland;" and that all such powers as are given to Courts Ecclesiastical, if of punishing contempts or of compelling appearances, shall be exercised by the said Judicial Committee, and if of enforcing decrees and orders shall be exercised by his Majesty in Council, in such and the same manner as the powers in and by such Act of Parliament given, and shall be of as much force and effect as if the same had been thereby expressly given to the said Committee or to his Majesty in Council.

2 & 3 Will. IV. c. 93.

Registrar of Court of Admiralty may attend the said Judicial Committee.

XXIX. And be it further enacted, That, subject to such orders as his Majesty in Council shall from time to time make, it shall be lawful for the present Registrar of the High Court of Admiralty, if he shall so think fit, either in person or by deputy, to attend the hearing by the said Judicial Committee of all causes and Appeals which, but for this Act or the said last-mentioned Act, would have been heard by any Court or Commission which such Registrar was entitled to attend, in person or by deputy, by virtue of his offices of Registrar of the High Courts of Admiralty, delegates, and Appeals for prizes, and likewise, subject to any order of his Majesty in Council, to transact, perform, and do all acts, matters, and things that shall be found necessary, or have heretofore been done by the said Registrar or his deputies in respect of such causes and Appeals.

Retired judges attending the Judicial Committee to receive an allowance.

XXX. And be it enacted, That two members of his Majesty's Privy Council who shall have held the office of judge in the East Indies or any of his Majesty's dominions beyond the seas, and who, being appointed for that purpose by his Majesty, shall attend the sittings of the Judicial Committee of the Privy Council, shall severally be entitled to receive over and above any annuity granted to them in respect of having held such office as aforesaid, the sum of four hundred pounds for every year during which they shall so attend as aforesaid, as an indemnity for the expense which they may thereby incur; and such sum of four hundred pounds shall be chargeable upon and paid out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland.

Nothing herein shall prevent the King's acceding to treaties appointing certain persons to hear Prize Appeals.

XXXI. Provided always, and be it enacted, That nothing herein contained shall be held to impeach or render void any treaty or engagement already entered into by or on behalf of his Majesty, or be taken to restrain his Majesty from acceding to any treaty, with any foreign prince, potentate, or power, in which treaty it shall be stipulated that any person or persons other than the said Judicial Committee shall hear and finally adjudicate Appeals from his Majesty's Courts of Admiralty in causes of Prize, but that the judgments, decrees, and orders of

such other person or persons so appointed by treaty shall be of the same force and effect of which they would respectively have been if this Act had not been passed.

V.

The effects of the following Statute on Final Ecclesiastical Appeals are treated of in Chap. VI., p. 51, sup.

3 & 4 Vict., cap. 86.—A.D. 1840.

An Act for better enforcing Church Discipline.

[*7th August,* 1840.]

Whereas the manner of proceeding in causes for the correction of clerks requires amendment: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That an Act passed in the first year of the reign of King Henry the Seventh, intituled "An Act for Bishops to punish Priests and other religious men for dishonest lives," shall be repealed. Repeal of 1 Hen. VII. c. 4.

II. And be it enacted, That, unless it shall otherwise appear from the context, the term "preferment" when used in this Act, shall be construed to comprehend every Deanery, Archdeaconry, Prebend, Canonry, office of Minor Canon, Priest Vicar, or Vicar Choral in Holy Orders, and every Precentorship, Treasurership, Sub-Deanery, Chancellorship of the church, and other dignity and office in any cathedral or collegiate church, and every Mastership, Wardenship, and Fellowship in any collegiate church, and all benefices with cure of souls, comprehending therein all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging to or reputed to belong, or annexed or reputed to be annexed, to any church or chapel, and every curacy, lectureship, readership, chaplaincy, office, or place which requires the discharge of any spiritual duty, and whether the same be or be not within any exempt or peculiar jurisdiction; and the word "Bishop," when used in this Act, shall be construed to comprehend "Archbishop;" and the word "Diocese," when used in this Act, shall be construed to comprehend all places to which the jurisdiction of any Bishop extends under and for the purposes of an Act passed in the second year of the reign of her present Majesty, intituled "An Act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy." Definition of the Terms "Preferment" "Bishop," "Archbishop" and "Diocese." 1 & 2 Vict. c. 106.

III. And be it enacted, That in every case of any clerk in Holy Orders of the United Church of England and Ireland who may be charged with any offence against the laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the Bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a Commission under his Bishop may issue a Commission of Inquiry.

hand and seal to five persons, of whom one shall be his Vicar-General, or an Archdeacon or Rural Dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report: Provided always that notice of the intention to issue such Commission under the hand of the Bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such Commission shall be about to issue, shall be sent by the Bishop to the party accused fourteen days at least before such Commission shall issue.

Notice to be previously given.

Proceedings of the Commissioners.

IV. And be it enacted, That it shall be lawful for the said Commissioners or any three of them to examine upon oath, or upon solemn affirmation in cases where an affirmation or declaration is allowed by law instead of an oath, which oath or affirmation or declaration respectively shall be administered by them to all witnesses who shall be tendered to them for examination as well by any party alleging the truth of the charge or report as by the party accused, and to all witnesses whom they may deem it necessary to summon for the purpose of fully prosecuting the inquiry, and ascertaining whether there be sufficient *primâ facie* ground for instituting further proceedings; and notice of the time when and place where every such meeting of the Commissioners shall be holden shall be given in writing under the hand of one of the said Commissioners to the party accused seven days at least before the meeting; and it shall be lawful for the party accused, or his agent, to attend the proceedings of the Commission, and to examine any of the witnesses; and all such preliminary proceedings shall be public, unless, on the special application of the party accused, the Commissioners shall direct that the same or any part thereof shall be private; and when such preliminary proceedings, whether public or private, shall have been closed, one of the said Commissioners shall, after due consideration of the depositions taken before them, openly and publicly declare the opinion of the majority of the Commissioners present at such inquiry, whether there be or be not sufficient *primâ facie* ground for instituting further proceedings.

Report of the Commissioners.

V. And be it enacted, That the said Commissioners or any three of them shall transmit to the Bishop under their hands and seals the depositions of witnesses taken before them, and also a report of the opinion of the majority of the Commissioners present at such inquiry whether or not there be sufficient *primâ facie* ground for instituting proceedings against the party accused; and such report shall be filed in the registry of the diocese; and that if the party accused shall hold any preferment in any other diocese or dioceses, the Bishop to whom the report shall be made shall transmit a copy thereof, and of the depositions, to the Bishop or Bishops of such other diocese or dioceses, and shall also, upon the application of the party accused, cause to be delivered to such party a copy of the said report and of the depositions, on payment of a reasonable sum for the same, not exceeding twopence for each folio of ninety words.

Bishop may pronounce sentence, by consent, without further proceedings.

VI. And be it enacted, That in all cases where proceedings shall have been commenced under this Act against any such clerk, it shall be lawful for the Bishop of any diocese within which such clerk may hold any preferment, with the consent of such clerk and of the party complaining, if any, first obtained in writing, to pronounce, without

any further proceedings, such sentence as the said Bishop shall think fit, not exceeding the sentence which might be pronounced in due course of law; and all such sentences shall be good and effectual in law as if pronounced after a hearing according to the provisions of this Act, and may be enforced by the like means.

Articles and depositions to be filed.

VII. And be it enacted, That if the Commissioners shall report that there is sufficient *primâ facie* ground for instituting proceedings, and if the Bishop of any diocese within which the party accused may hold any preferment, or the party complaining, shall thereupon think fit to proceed against the party accused may hold any preferment, or the party complaining, shall thereupon think fit to proceed against the party accused, articles shall be drawn up, and, when approved and signed by an Advocate practising in Doctors' Commons, shall, together with a copy of the depositions taken by the Commissioners, be filed in the registry of the diocese of such last-mentioned Bishop; and any such party, or any person on his behalf, shall be entitled to inspect without fee such copies, and to require and have, on demand, from the Registrar (who is hereby required to deliver the same), copies of such depositions, on payment of a reasonable sum for the same, not exceeding twopence for each folio of ninety words.

Service of copy of the Articles on the party.

VIII. And be it enacted, That a copy of the Articles so filed shall be forthwith served upon the party accused by personally delivering the same to him, or by leaving the same at the residence house belonging to any preferment holden by him, or if there be no such house, then at his usual or last known place of residence; and it shall not be lawful to proceed upon any such Articles until after the expiration of fourteen days after the day on which such copy shall have been so served.

Bishop may require the party to appear before him;

IX. And be it enacted, That it shall be lawful for the said last-mentioned Bishop, by writing under his hand, to require the party to appear, either in person or by his agent duly appointed, as to the said party may seem fit, before him at any place within the diocese, and at any time after the expiration of the said fourteen days, and to make answer to the said Articles within such time as to the Bishop shall seem reasonable; and if the party shall appear, and by his answer admit the truth of the Articles, the Bishop, or his Commissary specially appointed for that purpose, shall forthwith proceed to pronounce sentence thereupon according to the Ecclesiastical law.

and may pronounce Judgment on admission.

How notice and requisition to be served.

X. And be it further enacted, That every notice and requisition to be given or made in pursuance of this Act shall be served on the party to whom the same respectively relate in the same manner as is hereby directed with respect to the service of a copy of the Articles on the party accused.

Proceedings on a hearing before the Bishop.

XI. And be it enacted, That if the party accused shall refuse or neglect to appear and make answer to the said Articles, or shall appear and make any answer to the said Articles other than an unqualified admission of the truth thereof, the Bishop shall proceed to hear the cause, with the assistance of three Assessors, to be nominated by the Bishop, one of whom shall be an Advocate who shall have practised not less than five years in the Court of the Archbishop of the province, or a Serjeant-at-law, or a Barrister of not less than seven years' standing, and another shall be the Dean of his cathedral church, or of one

of his cathedral churches, or one of his Archdeacons, or his Chancellor; and upon the hearing of such cause the Bishop shall determine the same, and pronounce sentence thereupon according to the Ecclesiastical law.

Sentence of Bishop to be effectual in law.

XII. And be it enacted, That all sentences which shall be pronounced by any Bishop or his Commissary in pursuance of this Act shall be good and effectual in law, and such sentences may be enforced by the like means as a sentence pronounced by an Ecclesiastical Court of competent jurisdiction.

Bishop may send the cause to the Court of Appeal of the province.

XIII. Provided always, and be it enacted, That it shall be lawful for the Bishop of any diocese within which any such clerk shall hold any preferment, or if he hold no preferment, then for the Bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance or after the Commissioners shall have reported that there is sufficient *primâ facie* ground for instituting proceedings, and before the filing of the Articles, but not afterwards, to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such Court: Provided always, that the judge of the said Court may and he is hereby authorized and empowered from time to time to make any Order or Orders of Court for the purpose of expediting such suits or otherwise improving the practice of the said Court, and from time to time to alter and revoke the same: Provided also, that there shall be no appeal from any interlocutory decree or order not having the force or effect of a definitive sentence, and thereby ending the suit in the Court of Appeal of the province, save by the permission of the judge of such Court.

Judge of the Court may make Orders for expediting such suits.

No Appeal from interlocutory decree.

Bishop empowered to inhibit party accused from performing Services of the Church, &c.

XIV. And be it enacted, That in every case in which, from the nature of the offence charged, it shall appear to any Bishop within whose diocese the party accused may hold any preferment that great scandal is likely to arise from the party accused continuing to perform the services of the Church while such charge is under investigation, or that his ministration will be useless while such charge is pending, it shall be lawful for the Bishop to cause a notice to be served on such party at the same time with the service of a copy of the Articles aforesaid, or at any time pending any proceedings before the Bishop or in any Ecclesiastical Court, inhibiting the said party from performing any services of the Church within such diocese from and after the expiration of fourteen days from the service of such notice, and until sentence shall have been given in the said cause: Provided, that it shall be lawful for such party, being the Incumbent of a benefice, within fourteen days after the service of the said notice, to nominate to the Bishop any fit person or persons to perform all such services of the Church during the period in which such party shall be so inhibited as aforesaid; and if the Bishop shall deem the person or persons so nominated fit for the performance of such services he shall grant his licence to him or them accordingly, or in case a fit person shall not be nominated, the Bishop shall make such provision for the service of the Church as to him shall seem necessary: and in all such cases it shall be lawful for the Bishop to assign such stipend, not exceeding the stipend required by law for the curacy of the church belonging to the said party, nor exceeding a moiety of the net annual income of the

benefice, as the said Bishop may think fit, and to provide for the payment of such stipend, if necessary, by sequestration of the living: Provided also, that it shall be lawful for the said Bishop at any time to revoke such inhibition and licence respectively.

What Appeals may be.

XV. And be it enacted, That it shall be lawful for any party who shall think himself aggrieved by the judgment pronounced in the first instance by the Bishop, or in the Court of Appeal of the province, to appeal from such judgment; and such Appeal shall be to the Archbishop, and shall be heard before the Judge of the Court of Appeal of the province, when the cause shall have been heard and determined in the first instance by the Bishop, and shall be proceeded in in the said Court of Appeal in the same manner and subject only to the same Appeal as in this Act is provided with respect to cases sent by Letters of Request to the said Court; and the Appeal shall be to the Queen in Council, and shall be heard before the Judicial Committee of the Privy Council when the cause shall have been heard and determined in the first instance in the Court of the Archbishop.

Archbishops and Bishops, Members of the Privy Council, to be Members of the Judicial Committee on all Appeals under this Act.

XVI. And be it enacted, That every Archbishop and Bishop of the United Church of England and Ireland, who now is or at any time hereafter shall be sworn of her Majesty's Most Honourable Privy Council, shall be a member of the Judicial Committee of the Privy Council for the purposes of every such appeal as aforesaid; and that no such appeal shall be heard before the Judicial Committee of the Privy Council unless at least one of such Archbishops or Bishops shall be present at the hearing thereof: Provided always, that the Archbishop or Bishop who shall have issued the Commission hereinbefore mentioned in any such case, or who shall have heard any such case, or who shall have sent any such case by Letters of Request to the Court of Appeal of the province, shall not sit as a member of the Judicial Committee on an Appeal in that case.

Attendance of witnesses, and production of papers, &c., may be compelled.

XVII. And be it enacted, That it shall be lawful in any such inquiry for any three or more of the Commissioners, or in any such proceeding for the Bishop, or for any Assessor of the Bishop, or for the Judge of the Court of Appeal of the province, to require the attendance of such witnesses, and the production of such deeds, evidences, or writings, as may be necessary; and such Bishop, Judge, Assessor, and Commissioners respectively shall have the same power for these purposes as now belongs to the Consistorial Court and to the Court of Arches respectively.

Witnesses to be examined on Oath, and to be liable to Punishment for perjury.

XVIII. And be it enacted, That every witness who shall be examined in pursuance of this Act shall give his or her evidence upon oath, or upon solemn affirmation in cases where an affirmation is allowed by law instead of an oath, which oath or affirmation respectively shall be administered by the Judge of the Court or his Surrogate, or by the Assessor of the Bishop, or by a Commissioner; and that every such witness who shall wilfully swear or affirm falsely shall be deemed guilty of perjury.

Provisions of Act not to interfere with persons instituting suits to establish a Civil right.

XIX. Provided always, and be it enacted, That nothing hereinbefore contained shall prevent any person from instituting as voluntary promoter, or from prosecuting, in such form and manner and in such Court as he might have done before the passing of this Act, any suit which, though in form criminal, shall have the effect of asserting,

ascertaining, or establishing any Civil right, nor to prevent the Archbishop of the province from citing any such clerk before him in cases and under circumstances in and under which such Archbishop might, before the passing of this Act, cite such clerk under and in pursuance of a statute passed in the twenty-third year of the reign of King Henry the Eighth, intituled, "An Act that no person shall be cited out of the diocese where he or she dwelleth, except in certain cases."

23 Hen. VIII. c. 9.

Suits to be commenced within two years.

XX. And be it enacted, That every suit or proceeding against any such clerk in Holy Orders for any offence against the laws Ecclesiastical shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards: Provided always, that whenever any such suit or proceeding shall be brought in respect of an offence for which a conviction shall have been obtained in any Court of Common Law, such suit or proceeding may be brought against the person convicted at any time within six calendar months after such conviction, although more than two years shall have elapsed since the commission of the offence in respect of which such suit or proceeding shall be so brought.

Proviso.

27 Geo. III. c. 44 not to apply to suits against spiritual persons for certain offences.

XXI. And be it declared and enacted, That the Act passed in the twenty-seventh year of the reign of his late Majesty King George the Third, intituled "An Act to prevent frivolous and vexatious suits in the Ecclesiastical Courts," does not and shall not extend to the time of the commencement of suits or proceedings against spiritual persons for any of the offences in the said Act named.

Power of Archbishops and Bishops as to exempt or peculiar places or preferments.

XXII. And be it enacted, That every Archbishop and Bishop within the limit of whose province or diocese respectively any place, district, or preferment, exempt or peculiar, shall be locally situate, shall, except as herein otherwise provided, have, use, and exercise all the powers and authorities necessary for the due execution by them respectively of the provisions and purposes of this Act, and for enforcing the same with regard thereto respectively, as such Archbishop and Bishop respectively would have used and exercised if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such Archbishop or Bishop; and where any place, district, or preferment, exempt or peculiar, shall be locally situate within the limits of more than one province or diocese, or where the same, or any of them, shall be locally situate between the limits of the two provinces, or between the limits of any two or more dioceses, the Archbishop or Bishop of the cathedral church to whose province or diocese the cathedral, collegiate, or other church or chapel of the place, district, or preferment respectively shall be nearest in local situation, shall have, use, and exercise all the powers and authorities which are necessary for the due execution of the provisions of this Act, and enforcing the same with regard thereto respectively, as such Archbishop or Bishop could have used if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such Archbishop or Bishop respectively, and the same, for all the purposes of this Act, shall be deemed and taken to be within the limits of the province or diocese of such Archbishop or Bishop; provided that the peculiars belonging to any Archbishopric or Bishopric, though locally situate in another diocese, shall continue subject to the Archbishop or

Bishop to whom they belong, as well for the purposes of this Act as for all other purposes of Ecclesiastical jurisdiction.

No suit to be instituted except as herein provided.

XXIII. And be it enacted, That no criminal suit or proceeding against a Clerk in Holy Orders of the United Church of England and Ireland for any offence against the laws Ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted or provided.

If a Bishop is Patron of the preferment held by accused party, Archbishop to act in his stead.

XXIV. And be it enacted, That when any Act, save sending a case by Letters of Request to the Court of Appeal of the province, is to be done or any authority is to be exercised by a Bishop under this Act, such act shall be done or authority exercised by the Archbishop of the province in all cases where the Bishop who would otherwise do the act or exercise the authority is the patron of any preferment held by the party accused.

Saving of Archbishop and Bishop's powers.

XXV. And be it enacted, That nothing in this Act contained shall be construed to affect any authority over the clergy of their respective provinces or dioceses which the Archbishops or Bishops of England and Wales may now according to law exercise personally and without process in Court; and that nothing herein contained shall extend to Ireland.

Act may be amended this Session.

XXVI. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this Session of Parliament.

VI.

The effects of the following Statute on Final Ecclesiastical Appeals are treated of in Chap. VI., pp. 50, 51, sup.

6 and 7 Vict., cap. 38.—A.D. 1843.

An Act to make further Regulations for facilitating the hearing Appeals and other Matters by the Judicial Committee of the Privy Council.

[28*th July*, 1843.]

Whereas it has been found expedient to make further regulations for hearing and making Report to her Majesty in Appeals and other matters referred to the Judicial Committee of the Privy Council, and for the more effectual appointment of Surrogates in Ecclesiastical and Maritime Causes of Appeal, and for making orders or decrees incidental to such Causes of Appeal, and for the punishments of contempts, and compelling appearances and enforcement of judgments, orders, and decrees of her Majesty in Council, or of the said Judicial Committee, or their Surrogates, in such causes of Appeal: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That in any Appeal, application for prolongation or confirmation of Letters Patent, or other matter referred or hereafter to be referred by Her Majesty in Council to the Judicial Committee of the Privy Council, it shall be lawful for Her Majesty, by Order in Council or special Direction under her royal sign manual, having regard to the nature of the said Appeal or other matter, and in respect of the same not requiring

Appeals, &c., may be heard by not less than three Members of the Judicial Committee of the Privy Council under

a special order of Her Majesty.

the presence of more than three members of the said Committee, to order that the same be heard, and when so ordered it shall be lawful that the same shall be accordingly heard by not less than three of the members of the said Judicial Committee, subject to such other rules as are applicable, or under this Act may be applicable, to the hearing and making report on Appeals and other matters by four or more of the members of the said Judicial Committee.

Powers of the Judicial Committee and their Surrogates in respect to Appeals from Ecclesiastical and Admiralty Courts.

II. And be it enacted, That in respect of all incidents, emergents, dependents, and things adjoined to, arising out of, or connected with Appeals from any Ecclesiastical Court, or from any Admiralty or Vice-Admiralty Court (save in giving a definitive sentence, or any interlocutory degree having the force and effect of a definitive sentence), the said Judicial Committee and their Surrogates shall have full power, subject to such rules, orders, and regulations, as shall from time to time be made by the said Judicial Committee (with the approval of Her Majesty in Council), to make all such interlocutory Orders and decrees, and to administer all such oaths and affirmations, and to do all such things as may be necessary, or the Judges of the Courts below appealed from or their Surrogates in the cases appealed, or the Judges of the Courts appealed to or their Surrogates, or the Lords Commissioners of Appeals in Prize Causes or their Surrogates, and the Judges delegate or their condelegates under commissions of Appeal under the Great Seal in Ecclesiastical and Maritime Causes of Appeal, would respectively have had before an Act passed in the third year of the reign of His late Majesty, intituled "An Act for transferring the powers of the High Court of Delegates, both in Ecclesiastical and Maritime Causes, to his Majesty in Council," and another Act passed in the following Session of Parliament, intituled "An Act for the better administration of Justice in His Majesty's Privy Council," were passed.

2 & 3 Will. IV. c. 92.

3 & 4 Will. IV. c. 41.

Who to be Surrogates and Examiners of the Judicial Committee in Ecclesiastical and Admiralty Appeals.

III. And be it enacted, That the Surrogates and Examiners of the Arches Court of Canterbury and the High Court of Admiralty of England, and such persons as shall fom time to time be appointed Surrogates or Examiners of the said Courts, shall be by virtue of this Act Surrogates and Examiners respectively of the Judicial Committee of the Privy Council in all causes of Appeal from Ecclesiastical Courts and from any Admiralty or Vice-Admiralty Court.

Past Proceedings of Surrogates of the Judicial Committee valid, notwithstanding certain Informalities.

IV. And be it enacted, That all orders, decrees, and things heretofore done and expedited in such causes of Appeal by the Surrogates appointed by the said Judicial Committee of the Privy Council shall be deemed to be valid and effectual, if otherwise lawfully done and expedited, notwithstanding any informality or want of authority in respect to the same in the orders of His late Majesty in Council of the fourth day of February, One thousand eight hundred and thirty-three, of the said Judicial Committee of the fifth day of February, One thousand eight hundred and thirty-three, of the order of His late Majesty in Council of the ninth day of December, One thousand eight hundred and thirty-three, of an order of the said Judicial Committee of the tenth day of December, One thousand eight hundred and thirty-three, and an order of His late Majesty in Council of the twelfth day of August, One thousand eight hundred and thirty-five.

Manner of

V. And be it enacted, That subject to such rules and regulations as

may from time to time be made by the said Judicial Committee with the approval of Her Majesty in Council, and save and in so much as the practice thereof may be varied by the said Acts of the reign of His late Majesty or by this Act, the said causes of Appeal to Her Majesty in Council shall be commenced within the said times, and conducted in the same form and manner, and by the same persons and officers, as if Appeals in the same causes had been made to the Queen in Chancery, the High Court of Admiralty of England, or the Lords Commissioners of Appeals in Prize Causes respectively; and all things otherwise lawfully done and expedited in the said Causes of Appeal by the Registrar of the High Court of Admiralty of England, his deputy or deputies, in consequence of the passing of the said Acts of the reign of His late Majesty, shall be deemed to be valid to all intents whatsoever.

conducting Appeals before the Judicial Committee.

VI. And whereas by the provisions of the hereinbefore secondly-recited Act it was enacted, That the said Judicial Committee should have and enjoy in all respects such and the same power of punishing contempts and of compelling appearances, and that His Majesty in Council should have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders (both *in personam* and *in rem*), as are given to any Court Ecclesiastical by an Act of Parliament passed in a Session of Parliament of the second and third years of the reign of His Majesty King William the Fourth, intituled "An Act for enforcing the process upon contempts in the Courts Ecclesiastical of England and Ireland," and that all such powers as are given to Courts Ecclesiastical, if of punishing contempts, or of compelling appearances, should be exercised by the said Judicial Committee, and of enforcing decrees and orders should be exercised by His Majesty in Council, in such and the same manner as the powers in and by such Act of Parliament given, and should be of as much force and effect as if the same had been thereby expressly given to the said Committee or to His Majesty in Council: Be it enacted, That so much of the said Act as relates to the powers thereby given to the said Judicial Committee and to His Majesty in Council, under the last-recited Act, shall be repealed.

So much of 2 & 3 Will. IV. c. 93 as empowers the Judicial Committee and His Majesty in Council to punish Contempts, &c., repealed.

VII. And be it enacted, That for better punishing contempts, compelling appearances, and enforcing judgments of Her Majesty in Council, and all orders and decrees of the said Judicial Committee or their Surrogates, in all Causes of Appeal from Ecclesiastical Courts and from Admiralty or Vice-Admiralty Courts, Her Majesty in Council and the said Judicial Committee and their Surrogates shall have the same powers, by attachment and committal of the person to any of Her Majesty's gaols, and subsequent discharge of any person so committed, as by any Statute, custom, or usage belong to the Judge of the High Court of Admiralty of England; and the said Judicial Committee shall have the same immunities and privileges as are conferred on the Judge of the High Court of Admiralty of England under an Act passed in the fourth year of the reign of Her Majesty intituled "An Act to improve the practice and extend the Jurisdiction of the High Court of Admiralty of England," as fully as if the same had been thereby expressly given to the said Judicial Committee.

Punishing Contempts, compelling Appearances, enforcing Judgments, &c., in Causes of Appeal.

Orders, &c. may be enforced by Sequestration against certain persons pronounced contumacious and in Contempt.

VIII. And be it enacted, That in all Causes of Appeal to Her Majesty in Council from Ecclesiastical Courts, and from Admiralty or Vice-Admiralty Courts, in which any person duly monished or cited or required to comply with any lawful order or decree of Her Majesty in Council, or of the said Judicial Committee or their Surrogates, and neglecting or refusing to pay obedience to such lawful order or decree, or committing any contempt of the process under the seal of Her Majesty in Ecclesiastical and Maritime causes, shall reside out of the dominions of Her Majesty, or shall have Privilege of Peerage, or shall be a Lord of Parliament, or a Member of the House of Commons, it shall be lawful for the said Judicial Committee or their Surrogates to pronounce such person to be contumacious and in contempt, and after he shall have been so pronounced contumacious and in contempt to cause process of Sequestration to issue under the said seal of Her Majesty against the real and personal estate, goods, chattels, and effects, wheresoever lying within the dominions of Her Majesty, of the person against or upon whom such order or decree shall have been made, in order to enforce obedience to the same, and payment of the expenses attending such sequestration, and all proceedings consequent thereon, and to make such further order in respect of or consequent on such sequestration, and in respect to such real and personal estate, goods, chattels, and effects sequestrated thereby, as may be necessary, or for payment of monies arising from the same to the person to whom the same may be due, or into the Registry of the High Court of Admiralty and Appeals for the benefit of those who may be ultimately entitled thereto.

Inhibitions, &c. to be in her Majesty's name, and of force throughout the British Dominions.

IX. And be it enacted, That all inhibitions, citations, monitions, and other instruments incidental to or arising out of such Causes of Appeal shall be issued in the name of Her Majesty, and under Seal of Her Majesty in Ecclesiastical and Maritime Causes, and shall be of full authority in all places throughout the dominions of Her Majesty.

Monitions for Payments into the Registry of the Admiralty Court under Orders, &c.

X. And be it enacted, That in all Appeals in Ecclesiastical and Maritime Causes to her Majesty in Council it shall be lawful for her Majesty in Council, and the said Judicial Committee or their Surrogates, at the petition of any person interested in the same, to decree monitions for the transmission of any sum or sums of money respecting which any order or decree may be made, or any questions may be depending arising out of such causes, and the proceeds of all ships or vessels, goods and cargoes, respecting which any Appeals may be depending, into the Registry of the High Court of Admiralty and Appeals, for the benefit of the person or persons who may be ultimately entitled thereto, or for payment thereof to the person to whom the same may be lawfully due.

All Appeals from Ecclesiastical and Admiralty Courts may be referred to the Judicial Committee by an Order in Council.

XI. And be it enacted, That it shall be lawful for Her Majesty, by Order in Council, to direct that all Causes of Appeal from Ecclesiastical Courts, and from the Vice-Admiralty Court of the Cape of Good Hope, and all Vice-Admiralty Courts to the westward thereof, in which the Appeal and Petition of Reference to Her Majesty shall have been lodged in the Registry of the High Court of Admiralty and Appeals within twelve calendar months from the giving or pronouncing of any order, decree, or sentence appealed from, and all Causes of Appeal from Vice-Admiralty Courts to the eastward of the Cape of

Good Hope, in which the Appeal and Petition of Reference to Her Majesty shall have been lodged in the Registry of the High Court of Admiralty and Appeals within eighteen calendar months from the giving or pronouncing any order, decree, or sentence appealed from, shall be referred to the Judicial Committee of the Privy Council, and the said Judicial Committee and their Surrogates shall have full power forthwith to proceed in the said Appeals, and the usual inhibition and citation shall be decreed and issued, and all usual proceedings taken, as if the same had been referred to the said Judicial Committee by a special Order of Her Majesty in Council in each cause respectively.

Costs may be awarded by the Judicial Committee, and taxed.

XII. And be it declared and enacted, That as well the costs of defending any decree or sentence appealed from as of prosecuting any Appeal, or in any manner intervening in any Cause of Appeal, and the costs on either side, or of any party, in the Court below, and the costs of opposing any matter which shall be referred to the said Judicial Committee, and the costs of all such issues as shall be tried by direction of the said Judicial Committee respecting any such Appeal or matter, shall be paid by such party or parties, person or persons, as the said Judicial Committee shall order, and that such costs shall be taxed as in and by the said Act for the better administration of justice in the Privy Council is directed respecting the costs of prosecuting any Appeal or matter referred by Her Majesty under the authority of the said Act, save the costs arising out of any Ecclesiastical or Maritime Cause of Appeal, which shall be taxed by the Registrar hereinafter named, or his assistant Registrar.

Appointment of Registrar and Assistant Registrar in Ecclesiastical and Maritime Causes.

3 & 4 Vict. c. 66.

XIII. And be it enacted, That the Registrar of the High Court of Admiralty of England for the time being may be appointed by Her Majesty to be Registrar of Her Majesty in Ecclesiastical and Maritime Causes, and shall have power to appoint an Assistant Registrar, as provided by an Act passed in the fourth year of the reign of Her Majesty, intituled "An Act to make provision for the Judge, Registrar, and Marshall of the High Court of Admiralty of England," and shall, during his good behaviour, and while he shall be Registrar of the said High Court of Admiralty, hold his office of Registrar of Her Majesty in Ecclesiastical and Maritime Causes, and shall do all such things, and shall have the same powers and privileges in respect to the same, as belong to his predecessors in the office of Registrar of Her Majesty in Ecclesiastical and Maritime Causes.

Custody of Records, &c. of the Court of Delegates and Appeals.

XIV. And be it enacted, That all records, muniments, books, papers, wills, and other documents remaining in the Registry of the High Court of Admiralty and Appeals, appertaining to the late High Court of Delegates and Appeals for Prizes, shall be and remain in the custody and possession of the said Registrar of Her Majesty in Ecclesiastical and Maritime Causes.

Judicial Committee empowered to make Rules, &c. respecting practice and mode of proceeding in Appeals, &c.

XV. And be it enacted, That it shall be lawful for the said Judicial Committee from time to time to make such rules, orders, and regulations respecting the practice and mode of proceeding in all Appeals from Ecclesiastical and Admiralty and Vice-Admiralty Courts, and the conduct and duties of the officers and practitioners therein, and to appoint such officer or officers as may be necessary for the execution of processes under the said Seal of Her Majesty, and in respect to all

Appeals and other matters referred to them, as to them shall seem fit, and from time to time to repeal or alter such rules, orders, or regulations: Provided always, that no such rules, orders, or regulations shall be of any force or effect until the same shall have been approved by Her Majesty in Council.

Proviso.

Judicial Committee of Privy Council to proceed with causes depending before late High Court of Delegates.

XVI. And whereas, in certain causes which were depending before the late High Court of Delegates, certain decrees or orders were made and interposed, and are not yet fully carried into effect: And whereas, in consequence of the death of the Judges Delegate, or some of them, named in the several Commissions under the Great Seal, such decrees or orders cannot be carried into effect: Be it enacted, That all such causes of Appeal and Complaint which were depending before the High Court of Delegates, and in which any decree, order, or thing, for the reason lastly hereinbefore mentioned, is outstanding and not fully ended and determined, shall be transferred to the Judicial Committee of the Privy Council; and the said Judicial Committee shall take up and proceed with the said causes in the same manner as if the same had been originally Causes of Appeal and Complaint depending before the said Judicial Committee.

Definition of Terms.

XVII. And be it enacted, That in this Act all words denoting a male person shall be taken to include a female also, and all words denoting one person or thing shall be taken to include also several persons or things, unless a contrary sense shall clearly appear from the context; and that the words "Arches Court of Canterbury," used in this Act, shall be construed to extend to such Court as shall exercise the jurisdiction of the said Court or be substituted for the same; and that wherever the words "Ecclesiastical Court" have been used in this Act, the same shall be construed to extend to such Court as shall exercise the jurisdiction or any part of the jurisdiction exercised by any Ecclesiastical Court or be substituted for the same; and the words "Ecclesiastical and Maritime Cause of Appeal" shall be construed to extend to causes appealed from Ecclesiastical Courts and such Court as shall exercise the jurisdiction or any part of the jurisdiction exercised by any Ecclesiastical Court or be substituted for the same.

VII.

The following is the Provision of the "Appellate Jurisdiction" Act, referred to in Chap. VI., p. 51, VII., p. 65, and XII., p. 99, sup., as altering the mode of appointing Episcopal Assessors in Ecclesiastical Appeals to the Judicial Committee of the Privy Council.

39 & 40 Vict., cap. 59.—A.D. 1876.

An Act for amending the Law in respect of the Appellate Jurisdiction of the House of Lords; and for other purposes.

XIV. . . . . Her Majesty may by Order in Council, with the advice of the Judicial Committee of Her Majesty's Privy Council or any five of them, of whom the Lord Chancellor shall be one, and of the Archbishops and Bishops being members of Her Majesty's Privy Council, or any two of them, make rules for the attendance, on the hearing of Ecclesiastical cases as Assessors of the said Committee of

such number of the Archbishops and Bishops of the Church of England as may be determined by such rules.

The rules may provide for the Assessors being appointed for one or more year or years, or by rotation or otherwise, and for filling up any temporary or other vacancies in the office of Assessor.

Any rule made in pursuance of this section shall be laid before each House of Parliament within forty days after it is made if Parliament be then sitting, or, if not then sitting, within forty days after the commencement of the next session of Parliament.

If either House of Parliament present an address to Her Majesty within forty days after any such rule has been laid before such House, praying that any such rule may be annulled, Her Majesty may thereupon by Order in Council annul the same, and the rule so annulled shall thenceforth become void, but without prejudice nevertheless to the making of any other rule in its place, or to the validity of anything which may in the meantime have been done under such rule.

XXIV. Section sixteen of the Act for better enforcing Church Discipline, passed in the session of the third and fourth years of the reign of Her present Majesty, chapter eighty six, ... shall be repealed. . . . .

VIII.

The following Order in Council was made, in pursuance of this Act, on November 28, 1876:—

Whereas there was this day read at the board a representation, dated at the Council Chamber, Whitehall, on the 15th of November inst., from the Right Hon. and Most Rev. the Archbishop of Canterbury, the Right Hon. and Most Rev. the Archbishop of York, the Right Hon. and Right Rev. the Bishop of London, the Right Hon. the Lord Chancellor and the Right Hon. the Lords of the Judicial Committee of Her Majesty's Privy Council, humbly recommending to Her Majesty that the following be the rules under the Appellate Jurisdiction Act 1876, by which it is enacted that Her Majesty may, by Order in Council, with the advice of the Judicial Committee of Her Majesty's Privy Council, or any five of them, of whom the Lord Chancellor shall be one, and of the Archbishops and Bishops being Members of Her Majesty's Privy Council, or any two of them, make rules for the attendance on the hearing of Ecclesiastical Cases, as Assessors of the said Committee of such number of the Archbishops and Bishops of the Church of England as may be determined by such rules, and that the rules may provide for the Assessors being appointed for one or more year or years, or by rotation, or otherwise, and for filling up any temporary or other vacancies in the office of Assessor:—

I. The Archbishop of Canterbury, the Archbishop of York, and the Bishop of London shall be *ex officio* Assessors of the Judicial Committee of Her Majesty's Privy Council on the hearing of Ecclesiastical Cases according to the following rota—that is to say, the Archbishop of Canterbury from this day until the 1st of January, 1878, the Archbishop of York from the 1st of January 1878 till the 1st of January, 1879; and the Bishop of London from the 1st of January, 1879, until the 1st of January, 1880, and so on by a similar rotation for the period of one year each.

II. The other Bishops of Dioceses within the Provinces of Canterbury and York shall attend as Assessors of the Judicial Committee on the hearing of Ecclesiastical cases according to the following rota—that is to say, from this day until the 1st of January, 1878, the four Bishops who on this day are the four junior Bishops for the time being; seniority for the purpose of this Order to be reckoned from the date of appointment to the episcopal see; from the 1st of January, 1878, till the 1st of January, 1879, the four Bishops who on the 1st of January, 1878, shall be the four Bishops next in order of seniority; and from the 1st of January, 1879, till the 1st of January, 1880, the four Bishops who on the 1st of January, 1879, shall be the four Bishops next in order of seniority; and so on by a similar rotation until the senior Bishop for the time being is reached, when the rotation shall be carried back to and again commenced with the junior Bishop.

III. In the event of any one, or more than one, vacancy occurring in the office of Ecclesiastical Assessor, the vacancy or vacancies shall be filled up by the person or persons then next according to the rotations aforesaid.

IV. A summons to attend on the hearing of every Ecclesiastical case about to be heard before the said Judicial Committee shall be issued to the five Ecclesiastical Assessors for the time being; and no such case shall be heard before the said Judicial Committee unless there are at least three of such Assessors present at the hearing; provided that the Assessors present at the commencement of the hearing of any such case shall continue to be the Assessors for that case until it shall be fully heard and disposed of, although their term of office, according to the rotation aforesaid, may in the meantime have expired: provided also, that in the event of the death, resignation, or absence by reason of illness or other unavoidable cause of any one of the Assessors present at the commencement of the hearing, the hearing of the case may proceed so long as at least two Assessors are present.

Her Majesty, having taken the said representation into consideration, was pleased, by and with the advice of Her Privy Council, to approve the said rules made upon the recommendation of the Right Hon. the Most Rev. and Right Rev. Prelates, the Right Hon. the Lord Chancellor, and the Right Hon. the Lords of the Judicial Committee as aforesaid, and to Order, as it is hereby Ordered, that the same be punctually observed, obeyed, and carried into execution. Whereof the Most Rev. and Right Rev. the Archbishops and Bishops of Dioceses within the Provinces of Canterbury and York, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

C. L. Peel.

THE END.

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The work of the ENGLISH CHURCH UNION (which now includes Thirteen Bishops, 2,600 Clergy, and 18,000 Laity) is chiefly therefore to defend and maintain unimpaired the Doctrine and Discipline of the Church of England *against Erastianism, Rationalism,* and *Puritanism;* to afford counsel and protection to all persons, Lay or Clerical, suffering unjust aggression or hindrance in Spiritual matters; and, in general, so to promote the interests of Religion, as to be, by GOD'S help, a lasting witness in the land for the advancement of His glory and the good of His Church.

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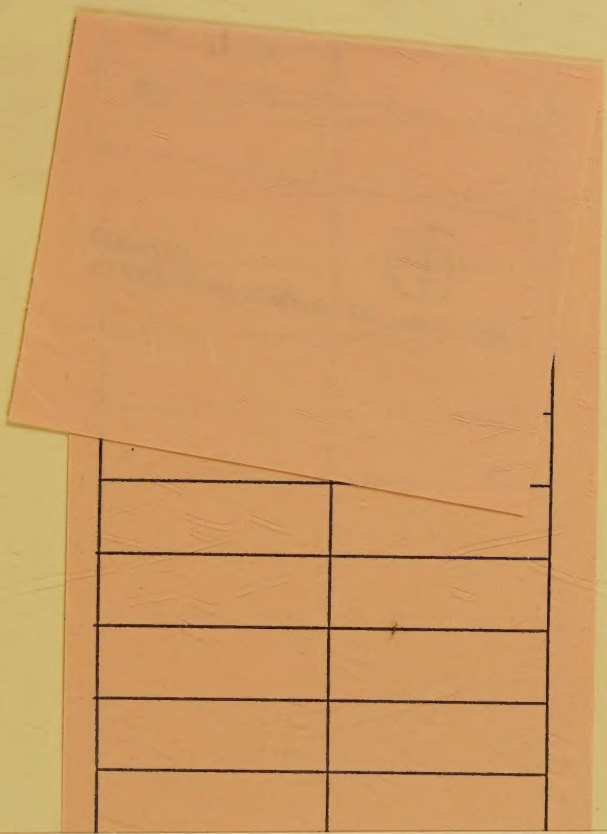

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